82-126

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ASADOOR SOOJIAN, et al.,
Petitioners,

vs.

JOHN R. DONALDSON, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

In 1971 the Planning Department of Fresno County, California granted to Petitioner Asadoor Soojian its "Site Plan Review No. 1507" authorizing the construction of a 264 space mobile home park on 33 acres. This document referred to itself internally as "this permit". The Site Plan expressly stated: "this approval is *final*" and authorized the *construction, without any further building permits*, of substantial improvements including underground utilities, grading, asphalt road, drainage, slabs for trailers, masonry walls and other improvements which constituted almost all of the expenses of creating this mobile home park. Only relatively incidental expenses relating to the construction of small structures for restrooms and laundry facilities required separate building permits. In reliance on this permit, and a separate additional permit obtained from the State of California, Petitioner cleared the entire 33 acre site of producing grape vines having a value in excess of $80,000.00, and thereafter expended more than $100,000.00 in completing almost all of Phase I of the mobile home park. These improvements consisted of the entire sewer system, including trenching to a depth of 12 feet in some instances, the installation of sewer pipe to each separate trailer pad, and the connecting line to the Fresno County trunk sewer. The entire water system was likewise completed, including the completion of a well, installation of pumps, and separate water lines to each trailer space. More than one-half mile of utility pipes were installed. The improvements also included rough grading for the entire 33 acres, including the construction of drainage facilities and roads to such an extent that only black-topping remained for completion.

The Petitioner also constructed over one hundred feet of 6 foot high masonry walls, completed a portion of the landscaping, and had the engineering completed for the entire 33 acres. However, partly because of an injury to

himself, and partly because of financing, the Petitioner did not obtain structural building permits for the restroom or laundry facilities.

In 1977, *without any prior notice or opportunity to be heard*, the Department of Public Works, the Planning Department and the County Counsel of Fresno County sent a letter to the Petitioner stating that because, in their opinion, "substantial development" had not taken place, his site plan was, therefore, "deemed void."

The Petitioner was given 15 days to appeal this administrative action to the Fresno County "Board of Review," a non-elected group appointed by the Board of Supervisors. The Board of Review affirmed the action of the administrative staffs in revoking Petitioner's Site Plan Permit, on the *sole* ground that "substantial development" had *not* taken place.

Petitioner then appealed to the Board of Supervisors, although he attacked the jurisdiction of the Board of Supervisors to hear such a matter, as there was literally nothing in the Fresno County ordinances authorizing such a procedure by which permits could be "voided" *without prior notice or hearing*, and there was no statutory definition of what "substantial development" was. The Board of Supervisors upheld the revocation of the Site Plan by a 3-1 vote, notwithstanding an express finding, *contrary* to the Board of Review, that there had, indeed, been "substantial development as to Phase I."

Petitioners then brought suit for monetary damages against the individual members of the Board of Supervisors and others, for violation of their rights to due process and the Civil Rights Acts. The District Court of the Eastern District of California adopted a magistrate's findings and granted Respondents' motions for summary judgment and dismissal of the Complaint. The Ninth Circuit Court of Appeals affirmed.

The questions presented are:

1. When property owners have, pursuant to a final permit granting approval for commencement of construction, employed engineers, cleared 33 acres of valuable, income-producing crops; completed on-site surveying and staking; completed rough and final grading for streets and drainage; trenched, installed, back-filled and compacted over half a mile of sewer and water pipes, with connecting laterals, for the entire Phase I of a mobile home park; constructed over one hundred feet of 6 foot high masonry walls; and developed part of the landscaping, all of which had a value of almost $200,000.00, did they not thereby acquire a "vested interest" in the property so as to preclude arbitrary cancellation of their right to continue to construct the project?

2. Is the above-stated vested right protected by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Is the voiding of such property rights by Fresno County, as confirmed by the Court of Appeals, a "taking" of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

4. Is the procedure followed by Fresno County in having an administrative "voiding" without prior notice or opportunity to be heard, followed by a Board of Supervisors' review, compatible with procedural due process?

5. Is the utilization of a standard of alleged lack of "substantial development," when used as a basis to destroy vested rights, in a situation in which there was no statutory or other definition of "substantial development," an unconstitutionally vague standard not consistent with the concepts of due process and fair play?

6. Is the Opinion of the Ninth Circuit Court of Appeals contrary to the rulings of this Court as to what constitutes a "taking" as set forth in *Penn Central Transportation Company v. City of New York*, 38 U.S. 104, 57 L.Ed. 631, 98 S.Ct. 2646 (1978), and *Dobbins v. Los Angeles*, 195 U.S. 23, 49 L.Ed. 169 (1904)?

7. Was it proper for the Ninth Circuit Court of Appeals to sustain the dismissal of Petitioners' Complaint for violation of their rights under the Fifth and Fourteenth Amendments, and the Civil Rights Acts, in the light of this Court's decision in *Maine v. Thiboutot*, 448 U.S. 1, 65 L.Ed. 2d 555, 100 S. Ct. 2502 (1980), holding that *all* claims alleging deprivation of *any* federal right, Constitutional or statutory, constitute causes of action under 42 U.S.C. Sec. 1983?

8. May the self-executing provisions of the Fifth and Fourteenth Amendments, and personal rights protected by the Civil Rights Acts, be absolutely thwarted and made a nullity by the granting of a motion for summary judgment *after* the Defendants had acknowledged in writing that *ten triable issues of fact existed* and *before* the Plaintiffs received answers to timely-filed interrogatories and had an opportunity to take previously scheduled depositions?

9. When a cause of action for conspiracy under 42 U.S.C. Sec. 1985(3) is alleged in a verified Complaint against individual defendants, do those defendants have absolute or qualified immunity by virtue of being county employees?

PARTIES TO THE PROCEEDINGS

Petitioners:

Asadoor Soojian
Sharline Soojian
Manoog Soojian
Hagop Soojian
Irene Soojian
Tanny Soojian
Deborah Soojian
Sarkis Soojian
Tara Soojian
Tanya Soojian
as co-partners

Respondents:

John R. Donaldson
John Ventura
Bruce Bronzan
Sharon Levy
Leo Wilson
Manuel Lopez
J. Harold Carter
Ed Darden, Sr.
Wayne Dominick
Glee Ewell
Sally Fosse
Donald Schafer
Robert M. Wash
J. Steven Lempel
Floyd R. B. Viau
Bill Carmichael
Don Pauls
Donald Livingston
Walter Clark
John Weaver
Tom Harper
(employees or representatives of Fresno County)

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OCTOBER TERM, 1981

ASADOOR SOOJIAN, et al.,
Petitioners,

VS.

JOHN R. DONALDSON, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Asadoor Soojian and others, as co-partners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 12, 1982.

OPINIONS AND DECISIONS BELOW

On March 1, 1977, without any prior notice or hearing, the office of the County Counsel of Fresno County, acting in conjunction with the Department of Public Works and the Planning Department, notified Petitioner, Asadoor Soojian that his permit to construct a 263 space mobile home park (Site Plan Review No. 1507, issued September 1, 1971) was "deemed void" (Appendix L), notwithstanding his expenditure of hundreds of thousands of dollars of funds and property in reliance on said permit. Following an appeal by said Petitioner, the Board of Review of Fresno County affirmed the act of revoking the above-mentioned permit on May 4, 1977. The Board of Super-

visors of Fresno County thereafter affirmed the decision of the Board of Review by its decision on March 6, 1978. (Appendix K)

Petitioners filed a Complaint for monetary damages against members of the Fresno County Board of Supervisors, and others, for violation of their constitutional rights and deprivation of civil rights in an action entitled Soojian, et al., Plaintiffs, vs. Donaldson, et al., Defendants, in the United States District Court for the Eastern District of California, No. F-78-93-Civ. The action terminated in the granting of Respondents' motions for summary judgment and dismissal of the Complaint by District Court Order (Appendix C), and Judgment (Appendix B) on July 12, 1979.

Following an appeal, the Court of Appeals for the Ninth Circuit in Soojian, et al., Plaintiffs-Appellants, vs. Donaldson, et al., Defendants-Appellees, No. 79-4501, issued its Memorandum Opinion affirming the District Court judgment on March 12, 1982. This Opinion is unreported. (Appendix A)

JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the granting of the Respondents' motions for summary judgment and dismissal of the Complaint was filed March 12, 1982. This opinion is unreported. (Appendix A) An Order extending time to file a Petition for Writ of Certiorari to June 30, 1982 was made by Justice Rehnquist on May 24, 1982. The time was further extended by said Justice until July 21, 1982 by an Order dated June 22, 1982.

The grounds for the granting of this Petition for Certiorari are (1) that the Court of Appeals for the Ninth Circuit has decided questions involving the United States Constitution and statutes in a way in conflict with applicable decisions of this Court; (2) that said Court has decided important questions of Federal Constitutional and

statutory law which have not been, but should be, settled by this Court; and (3) that said Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) and Rule 17.1(a) and (c) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

California Health and Safety Code, Sections 18500(a), 18501 and 18509; California Public Resources Code, Sections 21065(c), 21167(a) and 21169. See Appendix O.

STATEMENT OF THE CASE

The District Court for the Eastern District of California had jurisdiction to hear and determine the Petitioners' Complaint by virtue of the self-executing provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States; 28 U.S.C. Sec. 1331; and 28 U.S.C. Sec. 13113, as said Complaint set forth causes of action arising out of rights protected by the Fifth and Fourteenth Amendments, and 42 U.S.C. Sec. 1983, 42 U.S.C. Sec. 1985(3) and 42 U.S.C. Sec. 1986.

On September 1, 1971, the Planning Department of Fresno County, California, issued to Petitioner Asadoor Soojian its "final" "Site Plan Review No. 1507." Although designated a Site Plan, it was, under the laws of the State of California and Fresno County, an actual "permit" to construct a 264-space mobile home park, and was designated, in its internal provisions, as "this permit." (Appendix M) Under this permit, no further building permits of any kind or character were required for engineering; staking; rough and final grading; drainage; construction of streets, including base and asphalt; 290 off-street parking spaces;

hundreds of feet of masonry wall 6 feet in height; all underground sewer and water lines; and landscaping. (Appendix M) (Testimony of Planning Department official, Robert H. Greve, Transcript p. 726)

In order to obtain this permit Petitioner had to submit a written application which contained an unconditional offer of dedication of the easterly 20 feet of the property to Fresno County as a right of way for road purposes. In addition, the application incorporated a "site development plan;" set forth in detail the location of every street; every parking place; every mobile home base; and a detailed description and location of each structure. This site development plan was stamped "approved" by the Planning Department prior to issuance of the above permit on September 1, 1971. The granting of this permit was evidence that Petitioner had complied with all of the requirements of the Fresno County Zoning Ordinance relating to the construction of a mobile home park on land then zoned A-1 which zoning permitted, as a matter of right, the construction of a mobile home park.

On September 22, 1972, more than one year later, Site Plan No. 1507 was revised and officially approved by the Planning Department. This second approval confirmed the September 1, 1971 approval, but reduced the number of mobile home spaces authorized from 264 to 263 spaces.

In addition, in 1972 Petitioner submitted an application for two additional building permits to the State of California Department of Housing and Community Development, one to construct a 16 foot by 30 foot wash building, and the other to construct a 28 space mobile home park, representing "Phase I" of the entire 33 acre project. The applications were in complete compliance with sections 18500(a) and 18501 of the California Health and Safety Code which provided, in part, that such applications "shall be accompanied by:

(a) A description of the grounds.

(b) *Plans and specifications of the proposed construction.*

(c) A description of the water supply, ground drainage and method of sewage disposal.

(d) Appropriate fees.

(e) *Evidence of the compliance with all valid local planning, health, utility and fire requiremenis."*

These two permits were issued by the State of California on December 18, 1972, thus confirming Petitioner's compliance with all of the above-mentioned requirements. (Appendix N)

Each of these permits was thereafter extended to June 18, 1974.

Site Plan No. 1507 remained in full force and effect until the Board of Supervisors of Fresno County, by a 3-1 vote, revoked it on March 6, 1978.

During the time the three permits were in full force and effect, and acting in complete reliance on each of them, Petitioner incurred economic losses and expended and incurred indebtedness of more than $200,000.00 including the following:

(1) Clearing the entire 33 acres site of existing, producing grape vines having a value of $82,000.00;

(2) Cost of removing grape vines, $3,000.00;

(3) Grading to the point of finished grade, $3,500.00;

(4) Hauling away 880 tons of dirt, $2,400.00;

(5) Headers for asphalt streets, and concrete forms and rebars, and labor for 128 feet of 6 foot masonry wall, $8,400.00;

(6) Off site engineering, $41,000.00;

(7) On site surveying, staking, leveling, engineering and establishing grades, $22,000.00;

(8) Constructing a new well 240 feet deep, 14 inches in diameter, including pump and electrical units and water pressure tank, $18,500.00;

(9) Installation, including trenching, installing, backfilling and compacting of 1,430 feet of sewer pipe and 1,400 of water pipe, including excavation to a depth of 12 feet in some areas to obtain gravity flow for sewer system, running of sewer line to Fresno County trunk sewer, and construction of vertical pipes for both sewer and water system to each and every trailer space in Phase I, $22,000.00;

(10) Landscaping, $1,500.00.

Total $204,300.00

The above-mentioned well and water pressure system were inspected, approved, and "signed off" by State of California representatives.

On December 5, 1972, the sections of the Public Resources Code of the State of California containing the provisions of the California Environmental Quality Act of 1970 became effective. However, section 21169 of the Public Resources Code stated that any project "undertaken, carried out or approved on or before the effective date of this section and the issuance by any public agency of any . . . permit is hereby confirmed, validated and declared legally effective." (See Appendix O, p. A-102) Petitioner's project was not subject to the CEQA, as the permit contained in Site Review No. 1507 had been granted *more than 15 months before* the effective date of this legislation, and substantial construction had been undertaken prior to the effective date.

A separate ground that the Petitioner's project was *not* barred by the above-mentioned Environmental Quality Act of 1970 is that section 21167(a) of the Public Resources Code provides that any action to attack, review, set aside, void or annul acts or decisions of the public agency on the grounds of non-compliance with this division shall be

commenced within 180 days of the public agency's decision to carry out or approve the project or within 180 days after *commencement* of the project. Therefore, even if it could be asserted that the Environmental Quality Act applied as of December 5, 1972, any action to attack or void the Petitioner's project would have had to be commenced by the appropriate public agency *no later* than June 5, 1973. *No such action was taken.*

On August 15, 1974, Fresno County Zoning Ordinance Section 874-A-7 was amended to include the following language:

> "An approved site plan shall become void when substantial development has not *commenced* within one year after the approval of the site plan."

Notwithstanding the obvious fact that substantial development was *commenced* within one year of the *approval* of the site plan on *September 1, 1971*, the Board of Supervisors erroneously determined that the "commencement" date should be that of August 15, 1974, and further, erroneously determined that there was not "substantial development" between August 15, 1974 and August 15, 1975.

Moreover, the adoption of the change of zoning did not, and could not under California law, retroactively operate to revoke the approval of projects previously approved and under construction.

On September 30, 1976, long *after* Petitioner had expended over $200,000.00 on the project, the subject property was rezoned from A-1 to AE-20. The latter zoning was defined as exclusively agricultural; mobile home parks are not permitted in any AE zone district.

Although the Petitioner had completed approximately 80 percent of the total construction of Phase I of the mobile home park, as a result of an injury which precluded his supervision of this construction for an extended

period of time and because of certain financing delays, the above-mentioned wash building (which, according to the building permit, was to cost only $6,000.00), and a separate structure consisting of restrooms were not constructed. However, unlike the usual residential or commercial development in which the major costs of the development are incurred and spent *after* a building permit has been obtained from the appropriate agency, and the residential or commercial buildings thereafter constructed, as to a mobile home park virtually all of the construction expense consists of non-structural improvements, and only very minor, almost insignificant, expenses relate to structures such as laundry and restroom facilities.

On March 1, 1977, *without any prior notice or hearing*, the Office of the County Counsel of Fresno County, acting in conjunction with the Department of Public Works and the Planning Department of said County, addressed a letter to the Petitioner advising him that his "Site Plan Review No. 1507 . . . is deemed void," because they were of the opinion that "substantial development has not taken place on such site so as to create a vested right to complete the project." (Appendix L) There is *no* provision in the Fresno County Ordinance for such a determination in advance by County departments.

Petitioner appealed to the Board of Review of Fresno County objecting to the voiding of his Site Plan No. 1507, raising both California and United States Constitutional objections under the Fifth and Fourteenth Amendments, and the decision of this Court in *Dobbins v. Los Angeles*, 195 U.S. 223, 49 L.Ed. 169 (1904). On May 4, 1977, the Board of Review upheld the decision of the administrative agencies in revoking the Site Plan.

Petitioner then appealed to the Board of Supervisors of Fresno County, although he attacked the jurisdiction of the Board of Supervisors to hear the matter in the manner in which it had been raised and, in addition, presented

substantial oral and documentary evidence concerning the amount of construction performed under the permits and the value thereof. In addition, Petitioner raised substantial Federal and California Constitutional issues, and alleged that the revocation of his Site Plan, or an administrative determination not to permit the construction to continue, would be a violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution, and an illegal taking of his property without due process of law. The Board of Supervisors affirmed the decision of the Board of Review by its 3-to-1 decision on March 6, 1978. (Appendix K)

Although Petitioner disagreed with other conclusions of the Board of Supervisors, the Board of Supervisors did find, in its Conclusion No. 7, that as of August 15, 1975, there was substantial development of Phase I of the site. This was *contrary* to the decision of the Board of Review, and the alleged *lack* of substantial development was the *only* reason the Board of Review upheld the revocation of the Site Plan.

Petitioners, as co-owners of the property in question, immediately filed a civil Complaint in the United States District Court for the Eastern District of California on May 1, 1978 (Soojian, et al., Plaintiffs, vs. Donaldson, et al., Defendants, No. F-78-93-Civ.), seeking monetary damages for deprivation of their rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution and 28 U.S.C. Sec. 1331, and to redress violations of their civil rights under 2 U.S.C. Sec. 1983, 42 U.S.C. Sec. 1985(3) and 42 U.S.C. Sec. 1986.

Respondents thereafter made a motion for summary judgment and dismissal of Petitioners' Complaint, *notwithstanding the fact that they had stated in their Pretrial Statement that there were at least ten "Disputed Factual Issues!"* The District Court appointed a magistrate to make recommendations. At the hearing the mag-

istrate ruled that Respondents need *not* answer Petitioners' interrogatories (which had been timely served) and *denied* Petitioners' right to take depositions (which had been scheduled), which Petitioners intended to offer *in opposition to* the motion for summary judgment. Petitioners' request for a continuance was summarily denied.

The magistrate's recommendations were filed on April 12, 1979 (Appendix D). Petitioners objected to the magistrate's findings, conclusions, and recommended decision. (Appendix E) The District Court thereafter granted, by Order, the motion for summary judgment and for dismissal of the Complaint on July 12, 1979. (Appendix C) A District Court judgment was entered the same day. (Appendix B) This judgment is unreported.

Following an appeal to the United States Court of Appeals for the Ninth Circuit in Soojian, et al., Plaintiffs-Appellants, vs. Donaldson, et al., Defendants-Appellees, No. 79-4501, the Ninth Circuit issued its Memorandum Opinion affirming the District Court judgment on April 12, 1982. (Appendix A) This Opinion is likewise unreported.

This case is ancillary to, and a companion case with, that of Soojian v. Fresno County, brought in the California Superior Court for the County of Fresno, bearing case number A-996 in the 1981 term of this Court. Indeed, the cases are so intertwined that Appendices F through N, inclusive, of this Petition are identical to Appendices A-I, inclusive, of the Petition for a Writ of Certiorari in A-996.

In the companion case, Petitioner Asadoor Soojian's Petition for a Writ of Mandamus was rejected by a Judgment of the Superior Court of the State of California in Fresno County in an action entitled Soojian, Petitioner, vs. County of Fresno, et al., Defendants, Superior Court No. 2227791-1, on June 19, 1979. That decision is unre-

ported. (Appendix I) Findings of Fact and Conclusions of Law were also made. (Appendix J)

Following an appeal in that action, the California Court of Appeal, Fifth Appellate District, in Soojian, Plaintiff and Appellant, vs. County of Fresno, et al., Defendants and Respondents, No. 5 Civil 5066, issued its opinion affirming the Superior Court decision on December 9, 1981. That decision is unreported, as it was ordered not to be published by the Appellate Court. (Appendix H) The Court of Appeal denied a Petition for Rehearing without opinion on January 6, 1982. That order is unreported. (Appendix G)

On March 3, 1982, the California Supreme Court denied Appellant's Petition for Review in that action. That denial is unreported. (Appendix F)

Although this Petition for a Writ of Certiorari stands on its own merits, it is respectfully suggested that the Court consider the consolidation of this case, for purposes of hearing, with that of the Petition for a Writ of Certiorari in Soojian, Petitioner, vs. The County of Fresno, et al., Respondents, No. A-996, October Term, 1981, filed on or about June 1, 1982, because of the substantial identity of the parties and significantly similar issues of fact and law.

REASONS FOR GRANTING THE WRIT

A. The Law as to What Constitutes "Vesting" and "Taking" Under the Fifth and Fourteenth Amendments is Unsettled

This case presents a unique opportunity to this Court to establish clear guidelines for what is presently a significant—but, unfortunately, vague—area of constitutional law involving literally hundreds of millions of dollars of construction projects throughout the entire nation every year and, in the process, correct a manifest injus-

tice resulting from the decision of the Ninth Circuit Court of Appeals.

Legal commentators have repeatedly emphasized the unfortunate conditions that prevail because of the lack of action, or apparently inconsistent action, taken by this Court in the past. Thus, the author of *American Planning Law, Land Use and the Police Power,* has stated that the failure of the United States Supreme Court to participate in the development of what constitutes a compensable "taking" under the Fifth and Fourteenth Amendments is the single item "primarily responsible" for the confusion in this area. The author goes on to say that: "This part of the law has suffered heavily thereby." Williams, American Planning Law, Land Use and the Planning Power, Volume I, Section 4.04, at pages 93-94)

The comment in the ALR annotation following the decision of *Penn Central Transportation Company v. City of New York,* 438 U.S. 104, 57 L.Ed. 631, 98 S.Ct. 2646, (reh. den.) 58 L.Ed.2d 198, 99 S.Ct. 226 (1978) states: ". . . the Supreme Court has not been very precise in defining what constitutes a 'taking' of private property compensable under the Fifth Amendment." 57 L.Ed. 1254, at 1257 (1978)

Joseph Sax, in *Takings and the Police Power* (74 Yale Law Journal 36 (1964)) refers to the "crazy quilt pattern of Supreme Court doctrine" on the taking problem.

One of the most recent commentaries is that contained in a Harvard Law Review Note, 94 Harvard L.R. 1 (Nov., 1980) in which the author states: "Judicial interpretation of the 'takings' of the Fifth Amendment is notoriously confused."

This Court could not address the problem of "taking" in *San Diego Gas & Electric Company v. City of San Diego,* 450 U.S. 621, 67 L.Ed.2d 551, 101 S.Ct. 1287 (1981) as it determined that there was not a "final" state court

judgment which determined the necessary issues to give this Court jurisdiction. Such is not the case here. The California Court of Appeal, in the companion case referred to above, decided the issue against Petitioners squarely, as it determined—erroneously in Petitioners' view—that no taking had in fact occurred, notwithstanding that the Petitioners had expended literally years of labor and more than $200,000.00 of costs and investments in construction pursuant to three separate permits. This companion case was expressly referred to, and formed the basis of, the Ninth Circuit's decision. (Appendix A, p. A-2, 3)

In *Penn Central Transportation Company v. City of New York, supra,* this Court determined that no "taking" had occurred by the application of the New York Landmarks Preservation Law to the subject property by holding, *inter alia,* that the law did not interfere with the present uses of the building, but allowed the owner to continue using it as had been done in the past, thereby permitting the owner to profit from the building and obtain a reasonable return on its investment. *Id.* at pp. 135, 655.

In this case, having stripped 33 acres of prime agricultural land of mature grape vines, and having, by trenching, laying, back-filling and compacting over one-half mile of underground sewer and water lines, much of which would have to be dug up to permit reversion to agricultural use, and a 3-4 year wait before vines could again become commercially productive, the Petitioners in this case are in a far different situation from the owners of Grand Central Terminal in the *Penn Central* case. Here, the owners' action *in reliance* on 3 separate permits *has* prevented them from using their land, or making a profit from it.

In *Avco Community Developers, Inc. v. South Coast Regional Commission,* 17 Cal.3d 785, 132 Cal.Rptr. 386

(1976) certiorari was denied by this Court at 430 U.S. 952, 51 L.Ed.2d 801, 97 S.Ct. 1594 (1977). In that case this Court let stand a decision by the California Supreme Court to the effect that vested rights could *not* have been created in the property owner-developer as building permits for the structures which would involve the greatest outlay of funds for the project had not yet been obtained; therefore, the project was subject to the jurisdiction and requirements of the South Coast Regional Commission. In this case, as more than 90% of the expense of constructing a mobile home park is *not* involved in the matter of building permits for the relatively incidental laundry and restroom facilities, the issue of *when* a vested right *first* arises may be squarely faced and determined.

The "vesting" and the "taking" issues are clearly presented in Petitioners' case notwithstanding the fact that Petitioners are seeking damages, for the determination that Petitioners *did* acquire a vested interest by substantial construction of improvements under three separate valid and final permits issued by the Fresno County Planning Department and the State of California Department of Housing and Community Development is essential to the causes of action for damages.

Petitioners therefore seek a determination that, based upon such "vesting" and "taking", the action of the Board of Supervisors of Fresno County in revoking their permit, and that of the Ninth Circuit Court of Appeals in affirming that action by sustaining the orders granting summary judgment and dismissal of the Complaint, thus depriving them of the opportunity of completing a mobile home park which is more than 80% completed in its first phase, be vacated.

B. Petitioners' Property Rights Had "Vested" Prior to Fresno County's Action in Revoking Their Permit

The granting of this Petition will enable this Court to address two significant, important questions of constitu-

tional law, having wide applications among the 50 states: The first is the governmental action necessary, and the property owner's actions in reliance thereon, which will constitute a "vesting" of property rights sufficient to require constitutional recognition under the Fifth and Fourteenth Amendments. The second relates to the nature and extent of governmental activity which may be deemed a "taking" of those property rights. Only if *both* of these questions are answered in favor of the property owner is it necessary, in any given case, to address the question of whether the action categorized as a "taking" should be set aside,[1] or whether, depending upon the option of the governmental agency or the remedies sought by the property owner, "just compensation" should be determined and paid.[2]

Petitioners submit that this is a clear case in which "vesting" of property rights *has* occurred within the ambit of United States Constitutional protection, contrary to the opinion of the Court of Appeals below. (Appendix A)

The facts of the issuance of three separate permits to the Petitioners by the Planning Department of Fresno County on September 1, 1971 (Appendix M) and by the State of California on December 18, 1972, are undisputed. (Appendix N)

Likewise, there can be no doubt that the Petitioners incurred substantial economic loss in reliance on these permits by clearing their land of 33 acres of valuable grape-producing vines. The Petitioners' valuation of $80,000.00 of value for the vines, and $2,500.00 for the clearing of them from 33 acres, remains undisputed on the record.

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[1]See *Dobbins v. Los Angeles*, 195 U.S. 223, 49 L.Ed. 169 (1904).

[2]See *Agins v. Tiburon*, 447 U.S. 255, 65 L.Ed. 106, 100 S.Ct. 2138 (1980).

In addition, although the County of Fresno and its representatives asserted that from *looking at the land* they could not see substantial improvements to the property other than grading, roadways, drainage and construction of masonry walls, the evidence is undisputed that the Petitioners installed more than 1,400 feet of sewer line, and more than 1,400 feet of water line, and had all of said improvements inspected, approved and "signed off" by State of California Representatives.

Although there is some dispute as to the exact dollar amount expended, whether it be the sum of almost $200,000.00 sworn to by the Petitioners, or any lesser amount, the economic considerations are substantial in any event. See *Dobbins v. City of Los Angeles, supra,* in which the expenditure of $2,500.00 was deemed sufficient to warrant constitutional protection. It goes without saying that the value of 33 acres of producing grape vines destroyed; the value of installation of over one-half of a mile of sewer and water pipes; and the value of grading and constructing streets, drainage facilities and landscaping is utterly wasted . . . perhaps "forfeited" would be a more apt word . . . if the Petitioners are to be bound by a zoning change permitting only agricultural uses in the future and if they are not permitted to pursue damage claims against those causing such losses.

One of the reasons that the area of the law relating to "vesting" remains in a state of confusion, notwithstanding substantial economic expenditures in reliance on governmental acts, has been the rather myopic treatment of the *necessity* for *a building permit for structural construction,* whether or *not* it bears any economic relationship to the project which has received governmental sanction. Thus, in *Avco, supra,* notwithstanding years of time and millions of dollars of expenditures, the California Supreme Court held that no vesting took place as the number, height

and precise location of structures had *not* been identified and approved in a building permit. In Petitioners' case, the Site Plan *did* set forth the number, height and precise location of each structure.

Petitioners are *not* asserting that a property owner has a contractual right to a given zoning classification *vis-a-vis* his city, county, or state. In certain circumstances, where the nature and extent of structural construction of scores of single units or multi-story condominiums, or commercial or industrial buildings is involved, the denial of "vesting" may be appropriate if the number and design of these buildings, including height limitations and architectural treatment, has *not* been approved by the appropriate governmental agency. In such cases, where the ratio of site preparation costs to total construction costs is *small,* a holding of lack of "vesting" in terms of constitutionally protected rights may well be appropriate. But where, as here, over 90% of the value of the project, including site preparation and construction involved matters *other* than the construction of buildings—limited here to laundry and sanitary facilities—due process requires the determination of a standard different from the slavish veneration of an above-ground building permit requirement.

An analogy might be drawn to the hypothetical case of a multi-million dollar golf course adjacent to a hotel built years before in an unrelated phase of commercial development. Is there to be no constitutional recognition of "vesting" if a zoning change is made by the governmental entity *after* the construction of the golf course, but before the caddie shack has been constructed pursuant to a building permit? By using the present case as a vehicle to bring light to a "notoriously confused" area of the law, guidelines may be established that will be of fundamental importance to governmental entities and developers throughout the nation.

Although this Court has not yet ruled that a building permit is *not* a *sine qua non* for vesting, certain state courts have.

Thus, in *Raley v. Cal. Tahoe Regional Planning Agency*, 68 Cal.App.3d 965, 975, 137 Cal.Rptr. 699, 705 (1977) the Court of Appeal, Third District, observed that "Several decisions intimate that a building permit may no longer be *sine qua non* of a vested right if preliminary public permits are sufficiently definitive and manifest all final discretionary approvals required for completion of specific buildings." (Citing *Aries Dev. Co. v. California Coastal Zone Conservation Comm.*, 48 Cal.App.3d 534, 122 Cal.Rptr. 315 (1975), and others. In *Friends of Lake Arrowhead v. San Bernardino County Board of Supervisors*, 38 Cal.App.3d 497, 509, 113 Cal.Rptr. 539, 546 (1974) where plaintiffs urged that "substantial construction" within the meaning of the California Environmental Quality Act could not have been performed prior to institution of the proceeding on December 1, 1972, because a building permit was not issued until about November 27, 1972, the Court of Appeal stated that "The assumption that construction must be in reliance upon the issuance of a building permit is devoid of merit." Approval of a tentative tract map and a *site development plan* constituted "other entitlement for use" and the performance of grading and the construction of a retaining wall, which did not require a building permit, and the incurring of substantial liabilities for construction and material, were held to have satisfied the "substantial construction" requirement.

C. The Action of Fresno County in Revoking the Petitioners' Right to Complete Their Mobile Home Park Was an Unconstitutional "Taking"

If this Court grants certiorari and subsequently determines that there was no "vesting," then, of course, there can be no "taking" of a constitutionally protected property right. Petitioners submit, however, that "taking" did in

fact exist under the circumstances of this case, and that the decision of the Court of Appeals was contrary to decisions of this Court.

Thus, in *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979) this Court held that a "taking" occurred when the private property owner substantially altered Kuapa Pond from its natural state. In *Kaiser*, this Court ruled that even the exclusion of others was "universally held to be a fundamental element of property rights." (444 U.S. at 179-180) If the entrance of sailboats or small pleasure craft into a navigable pond is an unconstitutional "taking" as to a private property owner who might possibly suffer reduced valuation of his real estate development adjacent to the body of water, certainly the drastic action of changing the zoning after the first phase of a mobile home park is 80% complete and leaving the property owner with a series of streets, walls, and underground utilities which would have to be ripped out to make the land productive is even *more* of a "taking" by governmental action.

The facts in this case are far from the absence of "taking" found by this Court to exist in *Agins, supra*, where the Court held that the zoning ordinance in question neither prevented the best use of the owner's land, nor extinguished a fundamental attribute of ownership. In the *Agins* case the property owner had *not* submitted *any* plan for development of his property, but was attacking the zoning ordinance in question as an unconstitutional taking without regard to the nature of plans to be presented. In *this* case, Petitioner Soojian had specific, detailed plans approved by Fresno County when Site Plan No. 1507 was granted on September 1, 1971, and by the State of California the following year. Construction of Phase I of the mobile home park was 80% complete at the time Fresno County took administrative action deeming the previously-issued permit "void", and thereafter revoking it.

A review of the effort necessary to restore Petitioners' land to its former agricultural state demonstrates the extent of the "taking" here, and the necessity for redress in the form of money damages.

If the action of the Board of Supervisors and the Ninth Circuit Court of Appeals is *not* overturned, each and every one of 56 vertical sewer and water pipes to each separate trailer pad would have to be removed; a substantial portion of the water and sewer systems would have to be excavated and removed to enable farming operations to be resumed, for otherwise such pipes would prevent plowing and disking operations; substantial portions of the water and sewer system would be abandoned as useless where they were buried at deeper levels beneath the ground; and more than one hundred feet of masonry walls 6 feet high would have to be removed.

Perhaps most significantly, in terms of economic loss, to restore the land to the producing status it had before the grape vines were cleared *in reliance on the permits* would require substantial additional costs for new vines, labor to plant them, and labor, fertilizer and machinery use for four full years before they could again become productive. In this respect, the Petitioners' situation in regard to the "taking" is markedly different from other developers who still have their land available for immediate use if a particular construction project has been denied to them

Are all of these losses—based on Constitutionally-protected rights and the Civil Rights Acts—to be borne without access to any forum which will hear Petitioners' evidence as to their damage?

D. The Opinion of the Ninth Circuit Court of Appeals Is Directly Contrary to This Court's Decision in Dobbins v. Los Angeles

This Petition for Certiorari bears significant similarity to the factual situation in *Dobbins v. Los Angeles, supra.* In *Dobbins* the Petitioner had "nearly completed" the foundations of a gas works at the time the City of Los Angeles passed an ordinance amending the boundaries of a territory within which a gas works was permitted. Thus, in that case, as in this, substantial below the ground work was completed, but not the extensive structures which normally constitute the bulk of building construction costs. This Court unanimously determined that, under the circumstances of that case, the unlawful interference with vested property rights could not be acquiesced in, and referred the matter to the California Superior Court with directions to grant a trial of the issues.

Dobbins is, therefore, a *clear* statement of what constitutes an *impermissible* taking under the Fifth and Fourteenth Amendments to the Constitution.

Although the *Dobbins* case has been cited in numerous lower federal court and state court decisions, it has not been cited by this Court since 1935, and then only in reference to the invalidating of a statute by virtue of changing circumstances. *Nashville, C. & St. L.R. Co. v. Walters,* 294 U.S. 405, 79 L.Ed. 949, 555 S.Ct. 478 (1935). The Ninth Circuit opinion brushes *Dobbins* aside by calling it a "turn of the century Supreme Court decision." (Appendix A, p. A-3) Because *Dobbins* is a landmark decision, it is important that this Court reaffirm—or modify, if need be—its holding after a period of 78 years.

E. The Opinion of the Ninth Circuit Court of Appeals Is Directly Contrary to This Court's Decision in Maine v. Thiboutot

The Memorandum Opinion of the Ninth Circuit Court of Appeals completely misstates the fundamental basis of Petitioners' Complaint. In doing so, it looks to California law, rather than addressing the fundamental question of whether Federally-protected Constitutional rights, and Congressional statutes, have been violated by the Respondents.

Thus, the Ninth Circuit states: "The principal issue in this appeal is whether Soojian had a vested right under California law to build a mobile home park based on this site plan approval." (Appendix A, pp. A-1, 2) This view of the case is also obvious from the Ninth Circuit language: ". . . we withdrew this case from submission pending final resolution of the state law questions in the California Court of Appeal. That Court's opinion has now been filed." (Appendix A, p. A-2)

Thus, rather than reaching its own decision as to the Federal Constitutional and statutory rights invoked by the Petitioners' Complaint, the Ninth Circuit looked no further than the erroneous decisions of the California Courts. By so doing, the issues of the rights guaranteed by the United States Constitution were ignored and fell by the wayside.

If such a course of conduct in judicial proceedings were followed throughout the fifty states, then the guaranties of due process found in the self-executing provisions of the Fifth and Fourteenth Amendments to the United States Constitution would be nullity in this area of law, and would be superceded by fifty disparate state concepts as to what due process constitutes in the guaranteeing of property rights for persons in the United States.

The error of the Ninth Circuit is clearly shown by the decision of this Court in *Maine v. Thiboutot*, 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980), in which it was expressly held that *all* claims alleging deprivation of *any* federal right, Constitutional or statutory, constitute causes of action under 42 U.S.C. Sec. 1983. Indeed, where there is no other express statutory remedy, *Maine v. Thiboutot* held that 42 U.S.C. Sec. 1983 provides "the *exclusive* statutory cause of action." (100 S.Ct. at 2504) Without such a federal court remedy, there can be no assurance that any person can "both enjoin future deprivations and recover the value of those rights already taken." (See 94 Harvard Law Review, The Supreme Court, 1979 Term, p. 229)

Finally, the Ninth Circuit stated: "Since the California Courts have held that Soojian did not have a vested property right at the time of the revocation, the opportunity to seek substantive due process review does not arise." (Appendix A, p. A-3) If this view is sustained, then there was no basis for this Court's even accepting certiorari in *Penn Central Transportation Company v. City of New York, supra; Kaiser Aetna v. United States, supra; Agins v. Tiburon, supra; and San Diego Gas & Electric Company v. City of San Diego, supra.*

F. Fundamental Constitutional and Statutory Civil Rights Should Not Be Nullified by the Device of Granting a Motion for Summary Judgment, and Dismissal of a Complaint, Before the Opportunity of Discovery Under the Rules of Civil Procedure Can Be Availed Of

Discovery is a fundamental right of every litigant in the federal courts. Without these rights, as provided by the Federal Rules of Civil Procedure, Rules 26-37, a litigant is both blind and helpless. This is particularly true in cases in which the violation of Constitutional and civil rights is sought, and in which the proof of conspiratorial conduct is necessary.

The proceedings in the District Court, as condoned and affirmed by the Ninth Circuit, constitute a shocking violation of elementary procedural due process.

In the District Court, the respondents, in their Pretrial Statement, acknowledged that there were at least ten "Disputed Factual Issues." They nevertheless thereafter filed a motion for summary judgment under F.R.C.P., Rule 56(b), for summary judgment as to all of Petitioners' four causes of action. The Petitioners had previously timely served written interrogatories on the Respondents pursuant to F.R.C.P., Rule 33, and had timely noticed depositions pursuant to F.R.C.P., Rule 30.

Notwithstanding the fact that F.R.C.P., Rule 56(c), expressly refers to "answers to interrogatories," and that F.R.C.P., Rule 56(e) expressly provides that "the court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits," the magistrate who had been assigned to hear the matter ruled that the Respondents did *not* have to answer Petitioners' written interrogatories, and did *not* have to attend depositions. The Petitioners' request for a continuance to complete this discovery was summarily denied. (Appendix E, p. A-14)

Although this course of conduct by the magistrate was brought to the attention of the District Court judge by Petitioners' objection thereto, in which they specifically requested time to complete discovery (Appendix E, p. A-14), he nevertheless condoned this conduct by accepting the magistrate's findings and conclusions (Appendix D) and based the District Court Order (Appendix C) and Judgment (Appendix B) thereon.

G. The Respondents, Charged With Violations of Constitutional Rights and the Civil Rights Acts, Including Individual Conspiratorial Conduct, Must Be Responsible In Damages

In addition to the other causes of action based upon the self-executing provisions of the Fifth and Fourteenth Amendments to the United States Constitution, the Petitioners have asserted their rights to monetary damages in their Complaint under 28 U.S.C. Sec. 1331; 42 U.S.C. Sec. 1983; conspiracy under 42 U.S.C. Sec. 1985(3); and 42 U.S.C. Sec. 1986.

Whatever immunity, qualified or absolute, the Respondents might have as individuals under general Constitutional provisions previously enunciated by this Court, when they are charged with individual, conspiratorial activity, the Petitioners' right to recover damages sustained as a result of such conspiratorial activity must prevail over any immunity doctrine.

There has been much discussion concerning the difference between the liabilities of municipalities and counties on the one hand, as determined by this Court in *Owen v. City of Independence*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980), and the qualified immunity for various public employees discussed in *Owen, supra*, at 1408-1409, and *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975).

Petitioners submit that this is a distinction without a difference, at least so far as the principal respondents in this case are concerned. As Justice Brennan so aptly put it, "a municipality has no 'discretion' to violate the Federal Constitution." (*Owen, supra*, at 1415)

In the State of California, Government Code Section 25042 provides as follows:

> Any supervisor who (a) refuses or neglects to perform any duty imposed on him, without just cause, or (b) wilfully violates any law provided for his govern-

ment as a supervisor, or (c) fraudulently or corruptly performs any duty imposed on him, or (d) wilfully, fraudulently, or corruptly attempts to perform an act as supervisor which is unauthorized by law, in addition to any other penalty prescribed by law, forfeits to the county five hundred dollars ($500) for every such act, to be recovered on his official bond, and is further liable on his official bond to any person injured thereby for all damages sustained.

As it is obvious that the County of Fresno pays for its supervisors' official bonds, the Petitioners respectfully submit that in this case (and, probably, throughout the United States) an *alleged difference between "municipal" or "individual" liability is utterly illusory.* The Constitutional and statutory rights of citizens to be free from illegal deprivation of their civil rights should not stand on mere hair-splitting. Once the full extent of indemnification provided under county and city fidelity bonds is apparent, Petitioners submit that the imposition of "individual" responsibility on the part of county officials will *not* be deemed "so onerous as to paralyze the government official's decisiveness and distort . . . his judgment on matters of public policy." (*Owens,* 100 S.Ct. at 1418)

CONCLUSION

This Petition for Certiorari presents an unusual opportunity for this Court to resolve the present unsettled and confusing state of the law concerning matters which are of fundamental importance to state and local governments, and hundreds of developers, large and small, throughout the nation. Inasmuch as there have been final judgments by California lower and appellate courts, and these judgments were the bases for the Judgment of the District Court and the Opinion of the Ninth Circuit Court of Appeals, and inasmuch as the issues of "vesting" and "taking" were extensively treated in a series of hearings

before the Fresno County Board of Review and the Fresno County Board of Supervisors, all aspects of these vital issues are now available for this Court to address. The piecemeal consideration necessitated by the limited facts of other cases heretofore considered by this Court do not apply here.

No less important is the securing of uniformity throughout the circuits by a re-affirmation of this Court's decision in *Maine v. Thiboutot;* the opportunity to renounce any attempt to thwart the Civil Rights Acts by the device of preventing essential discovery as contemplated by the Federal Rules of Civil Procedure; and an opportunity to review in a pragmatic, rather than an abstract sense, the illusory difference between "municipal" and "individual" liability in damages, in a context where liability bonds preclude actual individual "liability" in any meaningful sense of the word.

Dated: July, 1982.

Respectfully submitted,

WILLIAM M. HARDY
COUNSEL OF RECORD
CLARK A. BARRETT
Attorneys for Petitioners

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 79-4501

D.C. No. 7-78-93 Civ.

Asadoor Soojian, et al.,
Plaintiffs-Appellants,

vs.

John R. Donaldson, et al.,
Defendants-Appellees.
[Filed Mar. 12, 1982]

MEMORANDUM

Appeal from the United States District Court
for the Eastern District of California
M. D. Crocker, District Judge, Presiding
Argued March 12, 1981; Submitted March 5, 1982

Before: Wallace and Pregerson, Circuit Judges, and Grant,* District Judge.

Soojian and his partners (Soojian) appeal from entry of summary judgment and a dismissal of their complaint. The complaint alleged due process and equal protection violations pursuant to 42 U.S.C. §§ 1983, 1985, and 1986 based upon the revocation of a site plan approval for a proposed mobile home park by the California Department of Public Works. The principal issue in this appeal is whether Soo-

*Honorable Robert A. Grant, United States District Judge, Northern District of Indiana, sitting by designation.

jian had a vested right under California law to build a mobile home park based on this site plan approval. The California superior court also rejected Soojian's contentions by denying a Writ of Administrative Mandamus. Subsequent to the district court's dismissal of Soojian's complaint, Soojian filed a notice of appeal in the state case. Since the district court's action depended in large part on the question of whether Soojian had a property right under California law, a question which was still being litigated in the California courts, we withdrew this case from submission pending final resolution of the state law questions in the California Court of Appeal. That court's opinion has now been filed.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Soojian essentially asserts that he has a constitutionally protected property interest in his site plan approval. Property interests, however, are not created by the Constitution but "stem from an independent source such as state law . . . ." *Id.* at 577; *see Bishop v. Wood*, 426 U.S. 341, 344 (1976). Thus, as the district court recognized, Soojian's due process claim hinges on whether the approval of a site plan creates a property interest under California law.

The California Court of Appeal found that Soojian had no vested property rights under California law. Since we are bound by a state court's interpretation of its own laws, *see, e.g., Hortonville Joint School Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 488 n.2 (1976); *Kingsley Int. Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959), we hold that the

district court did not err in granting summary judgment against Soojian on the procedural due process claim. Because Soojian has failed to establish a recognized property interest under California law, we need not decide whether the district court was correct in concluding that Soojian was afforded adequate notice and an adequate opportunity to be heard.

Soojian argues that it was error to grant a motion to dismiss for lack of subject matter jurisdiction. However, any error involved in the district court's dismissal for lack of jurisdiction is harmless, as the appellees made an alternative motion for summary judgment which was granted. Under Rule 56(c), summary judgment is proper where the moving party is clearly "entitled to a judgment as a matter of law." *See also* Rule 12(b).

Apparently, Soojian also argues that the due process clause provides substantive protection against revocation of a site plan approval. Although it is not explicitly argued that the revocation amounted to a taking of property without due process of law, Soojian cites a turn of the century Supreme Court decision which, it is contended, recognizes the vested rights doctrine. *Dobbins v. Los Angeles*, 195 U.S. 223 (1904). However, substantive due process review presupposes the existence of a property interest that has been encroached upon by government action. Since the California courts have held that Soojian did not have a vested property right at the time of the revocation, the opportunity to seek substantive due process review does not arise.

Soojian claims there was an unlawful combination of prosecutorial and adjudicatory functions and unlawful ex parte contacts between the County Counselor's Office and the Board of Supervisors which denied him an impartial decision-maker to review the revocation decision, and thus violated due process principles. We agree with the district court that since Soojian has not alleged that Wash and Lempel actually participated in the decision-making process of the Board, but only advised the decision-makers, that there was no denial of an unbiased review of the revocation decision. *See Hortonville Joint School Dist. v. Hortonville Ed. Assn., supra. See also Withrow v. Larkin,* 421 U.S. 35 (1975).

Soojian's final due process claim regards an alleged ex parte communication between Wash and the Board of Supervisors. Soojian bases his allegation on a January 6, 1978 newspaper article. Appellees filed an affidavit to the effect that the matter described in the newspaper article related to a statement made by Wash during a proceeding before the Board in Soojian's presence. Soojian has failed to offer any support in opposition to this affidavit, and thus, there is no evidence to substantiate the charge that an ex parte communication took place. We conclude that summary judgment was proper on this issue as there exists no material issue of fact regarding the alleged ex parte communication.

Finally, as to Soojian's section 1985(3) and 1986 claims, both sections provide for civil remedies for persons injured by conspiracies to deprive them of their right to equal protection of the laws. There must be some "racial, or perhaps

otherwise class-based, invidiously discriminatory animus behind the conspirator's action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (footnote omitted). Soojian's complaint essentially points to a conspiracy aimed at a denial of due process. There are no allegations in the complaint of any class-based discrimination on the part of the appellees. Consequently, summary judgment in favor of the appellees on this issue was proper.

AFFIRMED.

Appendix B

United States District Court
for the
Eastern District of California
At Fresno

Civil Action File No. F-78-93-Civ.

Asdoor Soojian, et al

vs.

John R. Donaldson, et al

[Filed July 12, 1979]

JUDGMENT

This action came on for (hearing) before the Court, Honorable A. D. Christensen, United States Magistrate, presiding, and the issues having been duly (heard) and a decision having been duly rendered, by Hon. M. D. Crocker, U.S. District Judge on July 11, 1979.

It is Ordered and Adjudged that defendants' motion for summary judgment and to dismiss the complaint is granted.

Dated at Fresno, Calif. this 12th day of July, 1979.

By: D. B. Butler
Deputy Clerk of Court

Appendix C

In the United States District Court
Eastern District of California

No. F-78-93 Civ.

Asadoor Soojian, et al.,
Plaintiffs,

vs.

John R. Donaldson, et al.,
Defendants.

[Filed, July 12, 1979]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND TO DISMISS THE COMPLAINT

On April 12, 1979, the Honorable A. D. Christensen, U. S. Magistrate, filed a recommendation to grant defendants' motion for summary judgment and to dismiss the complaint.

This court has reviewed the pleadings and concurs with the magistrate's recommendation.

THEREFORE, IT IS HEREBY ORDERED that defendants' motion for summary judgment and to dismiss the complaint is granted for the reasons set forth in the magistrate's recommendation.

DATED: July 11, 1979.

/s/ M. D. Crocker
United States District Judge

Appendix D

United States District Court
Eastern District of California

No. F-78-93-CIV

Asadoor Soojian, et al.,
Plaintiffs,

vs.

John R. Donaldson, et al.,
Defendants.

[Filed April 12, 1979]

MAGISTRATE'S RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND TO DISMISS THE COMPLAINT

The defendants' Motion for Summary Judgment and to Dismiss the Complaint came on regularly for hearing before the Honorable A. D. Christensen, United States Magistrate on December 26, 1978. William M. Hardy, Attorney at Law, appeared on behalf of the plaintiffs. J. Steven Lempel, Chief Deputy County Counsel for the County of Fresno, appeared on behalf of the defendants. Following oral argument, the matter was submitted to the Court for its recommendation.

Plaintiffs bring this action under 42 U.S.C. Sections 1983, 1985(3) and 1986 to redress the wilful, conspiratorial and unlawful deprivation, under color of state law, of rights secured to plaintiffs as citizens by the self-executing Fifth and Fourteenth Amendments to the Constitution of

the United States. But what is the right to be secured and protected? Plaintiffs complain that their property interest in the site plan approval is protected by due process of law. Unfortunately for plaintiffs, however, the issuance of a site plan does not create a property interest under California law. Governmental approvals that precede building permits or other final discretionary rights to construct the project do not give the developer a right to exemption from later changes in land-use regulations. *Avco Community Developers Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785. The Court, in *Avco*, stated: ". . . They stand for the proposition that neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued." Plaintiffs were granted two building permits, one authorizing the construction of a laundry room, and the other authorizing the construction of a 28-space mobile home park, but each was allowed to expire long before the re-zoning and revocation of the site plan approvals.

Without a controlling property interest which was sufficiently vested to invoke the protections of the Constitution or laws of the United States, plaintiffs have failed to establish subject matter jurisdiction. It is, therefore, the recommendation of the Court to the Honorable M. D. Crocker, United States District Judge, that as to the claims based on 42 U.S.C. Sections 1983, 1985 and 1986, the Motion to Dismiss be granted as to all defendants for lack of subject matter jurisdiction.

Plaintiffs also allege that "due process" was violated by the defendants' failure to afford plaintiffs prior notice and prior hearing, and further, that "due process" was violated when Mr. Wash, Mr. Lempel, and Mr. Viau aided the Board of Supervisors and the Board of Review in making their decision regarding the revocation of the Site Plan Approval. *Goldberg v. Kelley*, (1970) 397 U.S. 254, 90 S.Ct. 1011, delineated the process which must be followed by the government where it intends to alter the interests in which persons have acquired vested rights. *Goldberg*, supra, clearly stands for the proposition that a pre-termination hearing is only necessary when the interests which are to be affected relate directly to the recipient's ability to maintain subsistence. Due Process, in almost any other situation, is satisfied if the interested party is afforded notice prior to or consistent with affectation of the interest and if an opportunity to be heard is afforded within a reasonable time thereafter. Certainly the plaintiffs in this cause of action have been afforded adequate notice and an adequate opportunity to be heard.

In regards to the plaintiffs' allegation that "due process" was violated by the activities of Mr. Wash, Mr. Lempel and Mr. Viau as those activities related to the decisions by the Board of Supervisors and the Board of Review, the law is clear that in the absence of a situation where the prosecutor and the decision-maker are one and the same, "due process" is satisfied when the decision-maker remains unbiased. Only where the decision-maker plays a role in the prosecution would there be a presumption of bias. In this cause of action, the plaintiffs were afforded unbiased decision-makers in the form of the Board of Supervisors and

the Board of Review. Nowhere has it been alleged that Mr. Wash, Mr. Lempel or Mr. Viau actually participated in the decision-making, only that they advised the decision-makers. This level of advice is common-place, and clearly within the law. See *Hortonsville J.S.D. No. 1 vs. Hortonsville Ed.* (1976) 426 U.S. 482, 98 S.Ct. 2308, 49 L.Ed.2d 1. See also *Ford v. Civil Service Commission*, (1958) 161 C.A.2d 692, at 697.

Federal Rules of Civil Procedure, Rule 56 states:

> . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, the judgment sought shall be rendered forthwith.

Based on the above, it is the Court's recommendation that summary judgment enter in favor of all the defendants on the claims of failure to provide adequate notice and opportunity to be heard, and the activities of the County Counsel's office in relation to the decisions on review.

Dated: April 12, 1979

/s/ A. D. Christensen
United States Magistrate

Appendix E

United States District Court for the
Eastern District of California

No. F-78-93-CIV

Asadoor Soojian, et al.,
Plaintiffs,

v.

John R. Donaldson, et al.,
Defendants.

[Filed April 23, 1979]

OBJECTIONS TO MAGISTRATE'S FINDINGS, CONCLUSIONS, AND RECOMMENDED DECISION OF APRIL 12, 1979

INTRODUCTION

This is a civil rights case where the county granted permit to construct a mobilehome park, then revoked its permit after plaintiffs were in midstream and had obligations, labor and materials of the value of $362,300 in the project. [A-2, 3,].

The magistrate erred by allowing defendants' alternative motions for (1) summary judgment [Rule 56 Federal Rules of Civil Procedure] or (2) to dismiss the complaint for alleged failure to state a claim [Rule 12(b)(6) F.R.C.P.] or (3) to dismiss the complaint for alleged lack of jurisdiction over the subject matter. [Rule 12(b)(1) F.R.C.P.].

Plaintiffs object to the magistrate's recommended decision for the following reasons.

I

SUMMARY JUDGMENT IS NOT APPROPRIATE

Rule 56 F.R.C.P.

Defendants' motion for summary judgment should be denied, for—

(A.) Defendants did not prove (1) that "there is no issue as to any material fact" and (2) "that the moving party is entitled to judgment as a matter of law" [Rule 56(c) F.R.C.P.].

(B.) Defendants, in their pretrial statement of July 12, 1978, represented to this Court that *there are material issues of fact to be tried.* These issues are listed under "(4) Disputed Factual Issues" as follows:

"(a) There was no conspiracy.

(b) All of Defendants' acts were in good faith and reasonable.

(c) Plaintiffs acted in bad faith and with unclean hands.

(d) Plaintiffs never acquired a vested right to construct a mobile home park.

(e) All changes in the Fresno County Zoning Ordinance affected Plaintiffs' property.

(f) Plaintiffs' property was subject to the California Environmental Quality Act (CEQA).

(g) Plaintiffs suffered no damages as a result of Defendants' actions.

(h) All of Defendants' actions were legal and proper.

(i) Plaintiffs were not entitled to a hearing prior to revocation of the site plan.

(j) There were no improper ex parte communications."

(C.) Defendants failed to support their motion for summary judgment by affidavit. In all "motions supported by affidavit, the affidavit shall be served with the motion" [Rule

6(d) FRCP] and "served at least ten days before the time fixed for the hearing." [Rule 56(c) FRCP].

Plaintiffs timely filed their affidavit in opposition to defendants' motion for summary judgment. See Appendix A attached.

(D.) Defendants failed to "cite the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission or other matter" in the record to support their motion, as required by Rule 53(6)(d) and Rule 56 (a) FRCP, and as required by Local Rule 116(a). The unsupported statement of counsel is no substitute for an affidavit. The plaintiffs' affidavit in opposition stands undenied and uncontroverted.

(E.) Plaintiffs object to the magistrate's denying them discovery under Rules 32 and 33 FRCP. At the hearing, the magistrate ruled that defendants need not answer plaintiffs' interrogatories, which plaintiffs had timely served upon defendants. The magistrate denied plaintiffs opportunity to take depositions, which had been scheduled, and which plaintiffs intended to offer in opposition to defendants' motion for summary judgment. Plaintiffs averred that they had not completed discovery, had scheduled depositions and needed until March 1 to complete their discovery. The magistrate should have refused "application for judgment" or should have ordered a continuance to permits "depositions to be taken", as provided by Rule 56 (f) FRCP.

(F.) Plaintiffs object to the finding and conclusion "without controlling property interest *which was sufficiently vested* to invoke protection of the Constitution . . . plain-

tiffs have failed to establish subject matter jurisdiction." [underscoring supplied.] This is a finding that insufficient work had been done to create a vested right to complete the authorized construction. There is no evidence in the record to support this finding. To the contrary, plaintiffs' undenied affidavit shows the nature of the work done and its value. Plaintiff Soojian's affidavit repeated to the Court the evidence which had been set out in the administrative record as follows:

"SUMMARY OF TESTIMONY BY ASADOOR SOOJIAN CORROBORATED* BY MR. MANSELIAN, MR. GIBBS, MR. EHMAN AND MR. BENSON

Removing vines, clearing land	$ 3,000.00
Value of vines removed at $5.00 per vine	82,000.00
Initial rough grading	500.00
Grading to point of finish grade	3,000.00
Dirt hauled away (40-22 ton loads)	2,400.00
Pump and electrical	4,500.00
Water pressure tank purchase and hauling	4,700.00
Headers for asphalt	2,000.00
Concrete, forms, rebars, labor	6,400.00
Material on hand for laundry room	1,000.00
Water, sewer	22,000.00
On site surveying, staking, leveling engineering, establishing grade	22,000.00
Off site engineering	41,000.00
Asphalt	25,000.00
New well 14' to 240' deep	9,300.00
Landscaping	1,500.00
Land	132,000.00
Total	$362,300.00

*The references are to pages in the transcript of testimony at the hearings of December 8, 1977, and January 4, 1978. Mr. Asadoor Soojian [12-8-77] pp. 50, 53, 72, 74, 92-128, [1-4-78] pp. 114, 117, 121-126-128. Mr. Manselian pp. 11, 12, 13, 29, 30, 31, 41, 42 [12-8-77]. Mr. Benson [1-4-78] pp. 41, 42, 50, 51, 57. Mr. Gibbs [1-4-78] pp. 3-6, 8-11, 13-37.

(G.) Plaintiffs object to the conclusion: "However, the issue of the site plan does not create a property interest under California law." [Magistrate's Recommendation p. 2].

The Supreme Court of the United States reversed the Supreme Court of California in *Dobbins v. Los Angeles,* 195 U.S. 223 (1904) and held that where an owner undertook construction of a gas works in a permitted area and expended some $2,500 in erecting a foundation before a zoning ordinance was passed prohibiting gas works in that district, the owner was entitled to protection against unconstitutional encroachments which would have the effect of depriving her of her property without due process of law.

Thus a vested right is a constitutionally protected property right. *San Diego County v. McClurken,* 37 Cal 2d 683, 691, 234 P2d 972; *Griffin v. County of Marin,* 321 P2d 148 (1958); *Morgan v. County of San Diego,* 19 Cal App 2d 636, 97 Cal Rptr. 180. The California Court of Appeal, 4th District, Division 2, stated the rule thus in *Aries Development Co. v. California Coastal Zone Conservation Commission,* 48 Cal App 3d 534, 543, 122 Cal Rptr 315, 322 (1975):

> "In this state, one who in good faith reliance upon a building permit performs substantial work and incurs substantial liability in connection therewith acquires a vested right to complete construction notwithstanding an intervening change in the law that would otherwise preclude construction. (Citations omitted). The rule is grounded upon the constitutional principle that property may not be taken without due process of law. (See Transcentury Properties, Inc. v. State of California, 41 Cal App 3d 835, 844, 116 Cal. Rptr. 487."

The court said further: "once a right is vested, its impairment or destruction must comport with constitutional principles. 48 Cal App 3rd at 549, 122 Cal Rptr. at 325.

Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal 3rd 785, 132 Cal Rptr 386 (1976), does not resemble at all our case at bench. In *Avco,* the developer was required to obtain a permit under the California Coastal Zone Conservation Act of 1972 because it had not received approval of plans indicating the placement of buildings to be built upon a large subdivision. The size of the proposed buildings, the number of apartments of specified size, how high the buildings would be, or how many units would be built on the tract were not approved. In contrast here, Soojian's approved site plan described specifically with complete dimensioning the size, height and placement of the few actual structures (washhouses) and the size and placement of every trailer space, plumbing and water system, street and parking area for the project. See plaintiff's affidavit, Appendix A p. 10.

The issue whether plaintiffs had "a controlling property interest which was sufficiently vested" raises a question of fact which must be decided by trial. Defendants' pretrial statement recognized this.

It is noteworthy that in *Avco* denial of a vested right was *not* based on want of a construction permit. The Court disclaimed "blind insistence on an instrument entitled 'building permit'" [17 Cal 3rd at 797]. *Avco* followed *Spindler Realty Corp. v. Monning,* (1966) 243 Cal App 2d 255, 53 Cal Rptr 7; and *Anderson v. City Council,* 229 Cal App 2d 79, 40 Cal Rptr. 41 (1964), where work done without

previous authorization for the exact number, size and type of buildings to be erected on the site was held not to create a vested right which would protect the developer against a change in zoning ordinance. *Avco* agrees that a builder who has obtained approval of a specific structure which complies with the law in effect at the time the permit is issued and has performed substantial work would be entitled to a vested right. [17 Cal 3rd at 801, 132 Cal Rptr. at 396.] In the present case, plaintiffs not only were granted specifically detailed authorized use of the land but they also commenced substantial construction of Phase One of the project pursuant to an additional construction permit issued by the State of California, and the work was inspected and approved.

In a mobilehome park, a large proportion of the construction is in the laying of underground pipes to service the various trailer spaces and in the laying out of streets and parking areas. Construction of buildings is a minor feature of the project. This was recognized in *Morgan v. County of San Diego,* 19 Cal App 2d 636, 97 Cal Rptr 108, where the court observed that the fallacy of the "actual work on the ground standard" is that it bears no necessary or direct relationship to whether a developer is working in good faith to accomplish a project. A developer's effort is not to be condemned merely because an on the site inspection of actual construction may reveal very little. The statement in *Avco* about work preparatory to construction of buildings, quoted at page 2 of the Magistrate's recommendation relates to the situation in *Spindler* and in *Anderson,* supra. It does not fit the present case.

The Board of Supervisors concluded that "As of August 15, 1975, there was substantial development of the area limited to Phase One of the site." Since Phases one, two and three are parts of an interdependent whole, the finding of substantial development of Phase One is a finding that substantial work had been commenced on the entire project. [See Affidavit A-12]. A similar situation was discussed in *Sierra Club v. California Coastal Zone Conservation Commission,* 58 Cal App 3rd 149, 129 Cal Rptr. 742 (1976). Some of the developer's buildings were well along in construction; others had not been started. Vested rights for the whole project were held to have been established since the buildings not started were part of an interdependent whole. [See Affidavit A-12]. Likewise in *Kissinger v. Los Angeles,* 161 Cal App 2d 454, 327 P2d 10, (1958) expenditures of $2,300 on construction had been held sufficient to create a vested right in developers to complete a previously authorized project in the face of a zoning change which would prohibit the planned multiple dwellings. Since plaintiffs here were in midstream and had performed substantial development pursuant to the site plan approval to construct, plaintiffs have a constitutionally protected vested right to complete their project [A-12]. This protects plaintiffs against the 1976 ordinance change which rezoned the land AE-20 (exclusive for agriculture), relied on by the county counsel in their decision of March 1, 1977, revoking the Site Plan.

(H.) Plaintiffs object to the magistrate's findings [page 2] "Plaintiffs were granted two building permits, one authorizing the construction of a laundry room, and the other authorizing the construction of a 28-space mobile

home park, but each was allowed to expire long before the re-zoning and revocation of the site plan approvals." There is nothing in the record to support these findings.

The record shows to the contrary that plaintiffs obtained four, rather than two approvals. On September 1, 1971, Fresno County issued a "final permit" to construct a 264-space mobile home park, which recited on its face: "Use approved under this *permit* 264-space mobilehome park." [A-10]. In September 1972, the County revised the permit and reissued it, authorizing construction of a 263-space mobilehome park in three phases.

Robert H. Grove, the official who issued the Site Plan Approval, explained:

> "Q (by Mr. Murray): Now actually when the Site Plan was issued, isn't this a permit in itself to go ahead and construct the park under the conditions of the site plan?"
>
> A (by Mr. Grove): That's right, subject to those other requirements which are stipulated in the approval."

Mr. Grove explained that when the Site Plan Approval was issued, it was the intention that Mr. Soojian should be able to rely on it. Soojian would be permitted to build one phase of the park before the others; there was no time limit on the site plan review. Building permits must be secured from the State for specific things requiring electric, plumbing or structural permits, bu[t] there was no requirement for the approval that those other improvements that don't require structural permits could not be done prior to those which did require such permits. [A-10, 11].

Thus the site plan approval was a permit in itself to construct a mobilehome park which satisfied Sec. 18500 of the Mobilehome Parks Act of 1967. Plaintiffs did not need any further authorization than approval of their site plan # 1507 to start right in in 1971 to do work essential for the development of the project which did not involve structural, electrical or plumbing work, for which special permits were called for by the site plan.

Plaintiff did obtain special permits from the State of California, as called for by the site plan. On November 12, 1973, Kenneth Baker, District Representative of the Division of Codes and Standards, inspected and approved Soojian's sewer pipe installation for the California Department of Housing and Community Development. Another inspector inspected and approved Soojian's water pipe installation early in 1974. [A-11].

Plaintiffs' site plan # 1507 approving construction of 263 mobilehome spaces was valid when issued in 1971, was valid when modified and approved in 1972, and since several subsequent ordinance amendments did not automatically revoke the plan, it continued to be effective until revoked by County Counsel in March 1977.

A change in the zoning ordinance does not operate to revoke automatically approval of projects approved under previous law. *Transoceanic Oil Corp. v. City of Santa Barbara,* 85 Cal App 776, 195 P2d 148 (1948). The construction work on the park was lawfully performed by the plaintiffs prior to the revocation which defendants ordered without "Due Process" in March, 1977.

(I.) Plaintiffs object to the magistrate's conclusion on page three: ". . . a pre-termination hearing is only necessary when the interests which are to be affected relate directly to the recipient's ability to maintain subsistence. Due Process, in almost any other situation, is satisfied if the interested party is afforded notice prior to or consistent with affectation of the interest and if an opportunity to be heard is afforded within a reasonable time thereafter. Certainly the plaintiffs in this cause of action have been afforded adequate notice and an adequate opportunity to be heard."

The magistrate misinterprets *Goldberg v. Keily*, 397 U.S. 254, 90 S Ct. 1011 (1970). Two years after deciding that case, the Supreme Court of the United States reversed a similar misinterpretation and explained *Goldberg v. Kelly* in *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972). In *Fuentes v. Shevin*, the Florida and Pennsylvania replevin statutes were held to be unconstitutional under the Fourteenth Amendment since they worked a deprivation of property (even though it might be only a temporary deprivation, correctable later) without due process of law by denying the right to a hearing *before* the deprivation takes effect. The court pointed out that a prior hearing could be dispensed with only in exceptional cases to protect an extremely important governmental or general public interest when there was a special need for prompt action, such as the need to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, or to protect the public from misbranded drugs and contaminated food. [407 U.S. at 88 to 92]. In *Fuentes*, the Supreme Court

pointed out that the Fourteenth Amendment speaks of "property" generally, and the Court reaffirmed its traditional insistence that a hearing must be provided *before* a citizen is deprived of any significant property interest. [407 U.S. at 82].

Plaintiff's affidavit avers: "No notice of any hearing was given prior to the revocation on March 1, 1977. Mr. Carmichael's letter of January 18, 1977, says in effect: 'Because of the new AE-20 zoning, you can't have a trailer park. Signify that you agree.' Soojian's reply of February 3, 1977, says in effect: 'I have done a lot of work. I have a right to finish.'" [A-5].

"The plaintiffs were not given any hearing on any issue before any administrative tribunal prior to Mr. Lempel's letter of March 1, 1977, which announced [on behalf of County Counsel Wash] a decision that 'site plan review 1507 is deemed void.' That decision [a judgment] effectively deprived plaintiffs of a substantial [constitutionally protected] right without a prior trial." [A-5].

Here we have shown that plaintiffs' vested property rights are at stake. Plaintiffs seek redress for deprivation of their constitutionally protected property rights. The recommended decision says that plaintiffs had no property rights. But there is no foundation in fact for the magistrate's conclusion. Plaintiff's affidavit avers facts showing that plaintiffs do have a vested property right to complete the project. This material issue of fact cannot be resolved by summary judgment. Plaintiffs are entitled to their day in court.

(J.) Plaintiffs object to the findings and conclusions on pages 3 and 4, leading to the recommendation that ". . . summary judgment enter in favor of all of the defendants on the [issues of] . . . the activities of the County Counsel's office in relation to the decisions on review." "Due Process is satisfied when the decision-maker remains unbiased."

Whether the office of County Counsel, Mr. Lempel and Mr. Wash, were biased or unbiased is an issue of fact to be tried. Summary judgment is inappropriate when the central and perhaps only inquiry is the official's state of mind. See Wright, *Law of Federal Courts*, 493 (1976). (It is not feasible to resolve on motion for summary judgment cases involving state of mind. *Subin v. Goldsmith*, 224 F2d 753 (CA 2 1955).

In their affidavit, plaintiffs aver: "We agree that J. Steven Lempel acted for the Department of Public Works in all matters relating to the 1977 revocation of Site Plan Approval No. 1507. We agree that Mr. Lempel participated in the judicial function with the Department of Public Works in rendering a decision March 1, 1977, declaring void Site Plan No. 1507." [A-4].

"The March 1, 1977, decision is expressed in the following language: 'It is the opinion of the Department of Public Works, the Planning Department and the undersigned [Robert M. Wash, County Counsel, by J. Steven Lempel, Deputy] that substantial development has not taken place on such site so as to create a vested right to complete the project. Site Plan Review No. 1507 therefore is deemed void.' This establishes that Robert Wash and J. Steven Lempel participated in the judicial function of rendering

the decision of March 1, 1977. This decision on their parts was outside the scope of any lawful authority vested in them to make such a decision. A copy of said decision is attached to and incorporated by reference in plaintiffs' complaint." [A-4 and A-B].

"We deny that Mr. Lempel acted in the capacity of a prosecuting attorney on March 1, 1977, when he engaged in making the decision revoking Site Plan Approval No. 1507. We agree that the 1977 revocation of the permit occurred prior to hearings before the Board of Review and the Board of Supervisors and that Mr. Lempel did act as a prosecuting attorney on behalf of the Department of Public Works at those hearings. The action of the office of county counsel on March 1, 1977, in participating through Mr. Wash and Mr. Lempel in the decision making process deprived plaintiffs of a vested property right to continue to complete the construction of the mobilehome park, which had been approved under Site Plan Approval No. 1507. This action deprived plaintiffs of the "Due Process" guaranteed to plaintiffs by the Fourteenth Amendment to the Constitution of the United States." [A-5].

"The Board of Supervisors and the Board of Review . . . did not hear our appeal based upon the 14th amendment guaranties of freedom and property and due process. The matter appealed was the March 1, 1977, revocation of site plan 1507 without "Due Process". Instead of deciding the constitutional matter appealed, the Boards proceeded to cover up the prior unconstitutional action, and such cover up was beyond the scope of any quasi-judicial function." [A-6].

The magistrate's recommendation would dismiss the case without trying the issue whether plaintiffs were denied "Due Process" when the same persons who had issued the initial decision teamed together to control the board members' review of that decision. The board members felt obliged to follow the instructions given them by their advisor, Mr. Wash, as to what evidence they should consider or disregard. Plaintiffs object also to the instructions he gave the Board concerning California law. The Supreme Court has ruled repeatedly that a decision maker should not participate in the review of his own earlier decision. See *Goldberg v. Kelly*, 379 U.S. 254, 271 (1970); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Withrow v. Larkin*, 421 U.S. 35 (1975). When review of an initial decision is mandated, the decision makers should not be guided by the same persons who made the decision under review. Participation in the review by Mr. Wash and his deputy was improper.

The recommendation brushes aside the issue that "Plaintiffs were denied "Due Process" when County Counsel made ex parte communication to the Board of Supervisors to exact promises to find for the County at the forthcoming Finding of Fact hearing, as reported by the Fresno Bee January 6, 1978." [A-7].

"At the close of the hearing on Wednesday, January 4, 1978, the Chairman scheduled a further meeting to be held about a month later on February 7th (actually held March 6th) to adopt findings. The Chairman observed: 'Now, obviously, the decision is not final. Last time it happened, it got reversed. So, until those findings are adopted, there is

no final decision.' Tr 1-4-78 Ex 4A p. 55. The meeting adjourned." [A-7].

"On January 6, 1978, an article published in the Fresno Bee, Exhibit 02 at the March 6 hearing, Exhibit B to the Complaint, reported:

> "New findings of facts will be considered Feb. 7, County Counsel Robert M. Wash, whose deputy, Steven Lempel, argued the Public Works Department's case, *got a commitment from the board members that they will not reverse their decision again.*" (*Underscoring added.*)

Mr. Lempel offered no evidence whatsoever in the record before the Board of Supervisors to deny or disprove the report in the Fresno Bee." [A-7].

One of the fundamental premises inherent in the concept of an adversary hearing is that neither adversary be permitted to engage in an *ex parte* communication concerning the merits of the case with those responsible for the decision. Canon 17, ABA Canons of Judicial Ethics; Administrative Procedure Act, 5 USC §§ 554(d), 557(d)(1); *Sangamon Valley Television Corp. v. United States,* 269 F2d 221 (D.C. Cir. 1959).

In *Camero v. United States,* 375 F2d 777 (Ct. Cl. 1967), the court found that the "decisions were made, at least in part, on the basis of the *ex parte* communication . . ." and held: "This is enough to require us to invalidate plaintiff's removal." At page 781, the court said:

> "It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations

to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it. See *Viratelli v. Seaton*, 359 U.S. 535 (1959)."

Summary judgment is not appropriate where the record, including documents and pleadings, establishes facts which give rise to contradictory inferences, one of which supports the party opposing the motion. *United States v. Lange*, 466 F2d 1021 (CA 9 Calif. 1972). The policy against abuse of official power requires that a citizen be given opportunity to prove his claim that his constitutional rights have been infringed.

II

THE COMPLAINT STATES A CLAIM FOR WHICH RELIEF CAN BE GRANTED

Rule 12(b)(6) F.R.C.P.

In *Warth v. Selden*, 422 U.S. 490, 501 (1975) the Supreme Court of the United States pointed out that "for purposes of ruling on a motion to dismiss . . . both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." Citing *Jenkins v. McKeithen*, 395 U.S. 411, 421, 422 (1969).

The Second, Fifth and Tenth Circuits have held that a case brought to vindicate a citizen's civil rights should not be dismissed at the pleadings stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. *Holmes v. New York City Housing Authority*,

398 F2d 262 (CA 2 1968); *Varnes v. Merritt*, 376 F2d 8 (CA 5 1967); *Jones v. Hopper*, 410 F2d 1323 (CA 10 1969, cert. denied 397 U.S. 991).

The Fifth Amendment is made applicable to States by the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment's due process clause has been interpreted to impose on the states the same obligation imposed by the Fifth Amendment. *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662 (1935); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *City of Cincinnati v. Louisville & N. R. R. Co.*, 223 U.S. 290; *Chicago, B & Q R R v. City of Chicago*, 166 U.S. 226 (1897). The word "property" in these provisions is not used in the sence of the physical thing with respect to which the citizen exercises rights recognized by law, but "to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 377-378.

Analysis of the complaint will show that the subject matter of this case is deprivation without due process of law of a valuable vested property right to use plaintiffs' property for a mobilehome park on which plaintiffs had commenced substantial work in reliance upon authorization issued by

the County of Fresno. The magistrate's recommendation to dismiss assumes that plaintiffs had no such vested right. The assumption decides the case on the merits summarily without any proof to support the assumption, which is not a matter of law but is a disputed issue of fact.

In Count 1 of the complaint, brought directly under the Fourteenth Amendment to the U.S. Constitution, paragraph 5 sets forth in subparagraphs (a) through (g) particulars of defendants' actions, taken singly and in concert, to deprive plaintiffs of their property right without "Due Process of Law".

In Count 2, paragraphs 13 through 20 allege actions taken by the defendants under color of state law in furtherance of a conspiracy to deprive plaintiffs of their constitutionally protected right to continue to construct the project previously approved in Site Plan Review 1507 and of their right to "Due Process".

The Second Circuit stated the elements required to state a claim under § 1983:

> "To maintain a cause of action under § 1983, a plaintiff must show: (1) that he has been deprived of a right, privilege, or immunity secured by the Constitution and laws of the United States; (2) that the defendants subjected plaintiff to this deprivation, or caused him to be so subjected; and (3) that the defendants acted under color of any statute, ordinance, regulation, custom or usage of any state."

Kletschka v. Driver, 411 F2d 436 (2d Cir. 1969). To the same effect is *Jones v. Hopper*, 410 F2d 1323 (10th Cir. 1969, cert. den. 397 U.S. 991).

In § 1983 actions, it is not necessary to plead or prove that the defendants had a specific intent to deprive the plaintiff of his rights, nor to plead a conspiracy. "It is sufficient to establish that the deprivation of constitutional rights or privileges was the natural consequence of the actions of defendants acting under color or law, irrespective of whether such consequence was intended. *Ury v. Santee*, 303 F Supp 119 (D.C. Ill. 1969); *Stringer v. Dilger*, 313 F2d 536 (9th Cir. 1963); *Selico v. Jackson*, 201 F Supp 475 (D.C. Cal. 1962); *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962).

The third count of the complaint adds paragraphs 23 and 24 to set out a claim under 42 § 1985(3) which contains the elements called for in *Hoffman v. Halden*, 268 F.2d 280 (1959), where the Ninth Circuit said:

> "Under § 1985(3) Title 42 USC, the elements of a cause of action are: (1) that defendants conspired; (2) that the purpose of the conspiracy was to deprive plaintiffs of equal protection of the laws or equal privileges and immunities under the law; (3) a purposeful intent to discriminate, and (4) that defendants acted under color of State law or authority; (5) the requirements of § 1985 (3) that by acts in furtherance of the conspiracy, the plaintiff was injured in his person or property or was deprived of having and exercising a right or privilege of a citizen of the United States."

Count 4 of the complaint adds paragraphs 26 and 27 to allege a claim under 42 USC § 1986, which provides that every person who, having knowledge that any of the wrongs conspired to be done and mentioned in § 1985 are about to

be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, are liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, where such person by reasonable diligence could have prevented the act.

The Supreme Court has expressly held that property rights are as protectable under the civil rights acts as are personal liberties. *Lynch v. Household Finance Corp.*, 405 U.S. 538, reh. den. 406 U.S. 911 (1972). The recommendation for summary dismissal is erroneous.

III

THE COURT HAS JURISDICTION OVER THE SUBJECT MATTER.

Rule 12(b)(1) F.R.C.P.

The jurisdictional statutes make clear that the United States district courts have original jurisdiction over causes of action for deprivation of civil rights and under the self-executing "Due Process" clause of the Fourteenth Amendment.

28 USC § 1331 provides:

> "(a) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

The triable issue whether plaintiffs have been deprived of a vested right to complete their project, which is a right cognizable under the Fourteenth Amendment, should not be summarily dismissed.

28 USC § 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person"

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

(3) To redress the deprivation under color of any state law, statute, ordinance, regulation, custom or usage, of any right privilege or immunity secured by the Constitution of the United States.

Plaintiffs submit that the Court should reject the magistrate's recommended decision. Defendants' motions should be denied, and plaintiffs should be granted trial on the merits.

Respectfully submitted,

/s/ William M. Hardy
William M. Hardy
Attorney for Plaintiffs
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Telephone: (408) 275-6507

Appendix F

Order Denying Hearing
After Judgment by the Court of Appeal
5th District, Division , Civil No. 5066

In the Supreme Court
of the
State of California
In Bank

[Filed Mar. 3, 1982]

Soojian

vs.

County of Fresno, et al.

Appellant's petition for hearing DENIED.

/s/ BIRD
Chief Justice

Appendix G

In the Court of Appeal
of the
State of California
in and for the
Fifth Appellate District

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5 Civ. No. 5066
(Super. Ct. No. 227791-1)
[Filed Jan. 7, 1982]

Asadoor Soojian,
Plaintiff and Appellant,

vs.

County of Fresno, et al.,
Defendants and Respondents.

By the Court:

The petition for rehearing is denied.

Dated January 7, 1982

/s/ ZENOVICH, Acting P.J.

Appendix H

Not to Be Published
In Official Reports

In the Court of Appeal
of the
State of California
Fifth Appellate District

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5 Civ. No. 5066
(Super. Ct. No. 227791-1)

Asadoor Soojian,
Plaintiff and Appellant,

vs.

County of Fresno, et al.,
Defendants and Respondents.

[Filed Dec. 9, 1981]
OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Leonard Irving Meyers, Judge. Affirmed.

William M. Hardy and William Murray for Plaintiff and Appellant.

Floyd R. B. Viau, County Counsel, J. Steven Lempel, Chief Deputy County Counsel, and Jerome M. Behrens, Deputy County Counsel, for Defendants and Respondents.

In this case, plaintiff appeals from a judgment of the superior court denying his petition for administrative mandamus. The administrative mandamus action stems from a series of administrative hearings before the Board of Review and the Board of Supervisors of the County of Fresno relating to the revocation of a site plan for a proposed mobile home park.

The principal issue in this appeal is whether plaintiff had a vested right to build a mobile home park based on a site plan. We conclude he did not.

Site plan No. 1507 was approved and issued to plaintiff (hereinafter Soojian) by the County of Fresno Planning Department on September 1, 1971. It called for construction of a 264-space mobile home park in the County of Fresno and included the following conditions: that certain right-of-way be dedicated to the county; that driveway approaches, parking and circulation areas be surfaced; that parking spaces for 290 vehicles be installed; that Soojian submit the drainage plan; that a 15-foot wide landscape area be installed along Reed Avenue; that a six-foot high solid masonry wall or chain link fence with solid green planting be constructed along the north, south and west sides of the development. The site plan also required that building permits be obtained from the State of California *prior* to commencement of *any* construction. At the time the site plan was issued, the subject property was zoned A-1, which permitted mobile home parks as a matter of right. Moreover, there was no time limit stated on the site plan.

On April 11, 1972, the Fresno County zoning ordinance was amended to require a conditional use permit (C.U.P.) for mobile home parks in the A-1 zone district. Soojian never applied for a C.U.P., and he was not notified of any zoning change.

On September 25, 1972, the site plan was reviewed to incorporate minor changes. Nothing was said to Soojian regarding the amendment to the zoning ordinance requiring a C.U.P. for a mobile home park.

On December 5, 1972, Public Resources Code section 21169 became effective, which provided that the California Environmental Quality Act did not apply to projects approved before December 5, 1972.

On December 18, 1972, Soojian was issued two building permits by the State of California. One permit authorized construction of a laundry and the other permit was for a 28-space mobile home park. The building permits, by their terms, automatically expired on June 18, 1973. In November 1973, the state extended both permits to June 18, 1974. At this time, the State of California was responsible for issuing building permits for mobile home parks. (See Mobile Home Parks Act, Health & Saf. Code, § 18200 et seq.)

On August 15, 1974, the Fresno County zoning ordinance was amended to provide "Approved site plans shall become void when substantial development has not commenced within one year of approval of the site plan."

On September 30, 1976, the subject property was rezoned from A-1 to AE-20 (exclusive agricultural—20 acre minimum). Mobile home parks were not permitted in any AE zone district pursuant to this ordinance.

On March 1, 1977, Soojian was notified by letter from county counsel on behalf of itself, the department of public works and Fresno County Planning Department that site plan No. 1507 was revoked because Soojian failed to commence substantial development. Further, since the zoning ordinance no longer permitted a mobile home park on the site, building permits would not be issued for the proposed use.

On May 4, 1977, Soojian appealed the revocation by the department of public works to the board of review, which affirmed the revocation.

Thereafter, on March 6, 1977, Soojian appealed to the board of supervisors and, after numerous hearings, the board affirmed the revocation of the site plan.

SOOJIAN'S EVIDENCE

Soojian was desirous of building a mobile home park. He was unsure whether he could build such a park, so he took out an option to purchase the subject property consisting of grape vines. Thereafter, he went to the Fresno County Department of Public Works and was told that a park could be built under the applicable zoning ordinances. He asked for a permit, was told that he had to make a plot plan, which he did, and on September 1, 1971, he was told the plan was approved. He thereafter received a letter of approval.

Soojian testified that he relied on the site plan and the fact that there was no time limit. Likewise, from the time it was issued to January 1977, he was never advised by the county that he could not build the project.

Soojian devoted much of his testimony before the board of supervisors to the expenditures and work done on the park.

Soojian, a licensed contractor, did on-site construction and engineering from September 1971 to the end of January 1972 and some in 1973. (Soojian's family also helped in the project.) He described the work as driving stakes, laying out the land, laying out a road, surveying and "getting a grade." He had to stake where each trailer was going to sit; likewise, the staking was done so that he would know where the sewer and water lines were to be placed. Soojian totally staked phase 1 of the project and partially staked the rest of the project.[1] He did the engineering in reliance on the site plan approval.

Initially, Soojian valued this on-site engineering at $19,000. However, he revised this figure up to $22,000. He had no records showing the amount of time he put in, and he apparently based his figure for the on-site engineering on what other people were charging.

Soojian also installed header board for the purpose of laying a road and putting in the asphalt. He expended $2,000 which included material and labor. One-half of the headers were installed during the early part of 1973 with about one-eighth done in 1972 and another one-eighth done in the latter part of 1973, with small amounts done from then on. The header boards were not inspected.

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[1]Apparently, the phasing was inserted in the site plan approval for Soojian's convenience and had nothing to do with requirements of the county zoning ordinance. He was free to proceed with one area before another area.

Soojian also claims $6,400 was expended on "concrete forms, rebars, labor." These items apparently related to the building of a wall and putting in concrete where there was a curb or a "size change." Most of the work was performed during 1973. The wall was installed in sections (fall 1971, 32 feet; 1972, 56 feet; and 1975, 32 feet). Soojian admitted he "could be off" on the installation and was unsure on the time element or dates, yet he claimed that most of the wall was installed by the end of 1973. He did not keep time records, as he felt he had no reason to. He also did not bring to the hearing the receipts of bills for the cost of the wall. The wall was not inspected during the time of construction, and Soojian claimed this was unnecessary anyway.

Soojian next claimed $1,000 for materials acquired in 1971 to build a laundry room in accordance with the site plan specifications. The materials were purchased after the site plan approval but before the receipt of the building permit to build the laundry room.

There was also a major expenditure claimed for sewer and water pipes. The pipe cost about $10,000, and the machinery for installation cost $2,000 and $10,000 was for labor. Although Soojian claimed he had receipts for the purchase of the pipe, he did not bring the receipts with him. The time spent was based on his word, as he had no records showing the same.[2] Sojian obtained the sewer and

[2]Soojian based the $22,000 figure on his experience as a general contractor. He had also talked to a contractor who gave him the "price of today." It may also be noted that the figure was based on the cost as of approximately October 1977. Soojian did not know the cost when the pipes were installed. Soojian also stated that the $22,000 figure was based on the "value" of the work and materials.

water line permits (from the state) in December 1972 and then he started working. He installed the pipe during 1973 and worked all year long; he installed almost 1900 feet of water pipe and 1400 feet of eight-inch and 300 to 400 feet of four-inch sewer pipe.

Soojian also installed a water pump for the project in February to May 1975. He did not have a permit. He stated the pump and testing cost at $4,500. However, on cross-examination, he testified that he did not keep any records of work hours and, although he had bills on "every single thing" he paid on, he did not bring them to the hearing.

A water pressure tank was bought in July 1975. Soojian placed an $8,000 value on it which covered the cost of hauling, purchasing, cleaning, etc. The actual purchase price of the tank was $2,650.

Soojian placed a $9,361 cost for having a well drilled. It was dug in September or October 1977. Soojian had committed himself to the well driller on December 31, 1976, but did not make any inquiry whether he could get out of the agreement.

Soojian also attempted to introduce other costs relating to the project but was prevented from doing so.[3]

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[3]Pursuant to the advice of county counsel who advised the board of supervisors throughout the hearings, the board ruled that any evidence of the preliminary work, purchase of the property, clearing of the vines, site preparation, grading, dirt hauling and "off site engineering" could not be included in the claim for vested rights, estoppel or laches.

Nevertheless, offers of proof and some evidence were adduced relating to these items. Soojian himself testified he pulled all of the grapevines in the fall of 1971, atlhough his attorney stated half the

Soojian testified he was in a position to complete phase 1. He also stated there was a housing shortage in the area and that he could personally fill half the park with his own farm employees. He then testified as to the advantages of the park to the agricultural community (e.g., to keep steady employees after training them and provide a place for farm workers and others to live). Also, he has made a good faith effort to complete the park but had problems such as a back injury and running out of money.

Soojian also put on witnesses (the manager of a trailer park and two farmers) who testified as to the need for housing in the area and the fact that there would be no detrimental effect of pesticides on the people in the mobile homes.

Soojian also called a number of witnesses to establish the amount of work done on the project.

Harold Manselian, a general contractor and owner of Farm Lumber Supply Company, testified he was familiar with trailer parks and also noted how 90 percent of the work was underground. Manselian "surveyed" the project

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vines were pulled in 1971 after the site plan was granted. Soojian's attorney continued that in 1972 the demolishing of the vineyards was concluded. The attorney made an offer of proof that he could prove that the cost of demolishing the vines preparatory to making the use of the land in accordance with the permit was approximately $3,000, while the vines themselves were worth "some" $80,000. Soojian testified that insurance companies had placed a value of $5 per vine 15 to 20 years prior to the hearing. The deputy county counsel objected to this method of valuation.

Additionally, there was an offer of proof that Soojian expended $41,000 on off-site engineering which would include the preparation and calculations that are necessary to the project.

in September 1977 and, according to his breakdown of work done since 1972, he estimated the cost (excluding engineering and plans and the value of removing the vines) to be $94,530. (The figure included the cost for, inter alia, headers, rough grades and removal of the vineyard, asphalt, earth removal, trenching, landscaping and a water well.)

Manselian noted that he was making *current* cost estimates and he figured from a contractor's point of view. Additionally, he admitted that he could only guess the date when any of the work was done. Manselian opined that 80 percent of phase 1 had been completed from the date Soojian purchased the property despite the fact that Soojian still had to build the laundry room and a recreation room (the former was required by law).

Gary Gibbs, an "underground contractor" who specializes in installing sewer, water and storm drains, inspected the property in November 1977. Gibbs estimated that his firm would have done the installation of the sewer and water pipes for $20,106. Gibbs' estimate was apparently based on a 30-space mobile home park. When asked if the $20,106 figure would have been less in 1972, Gibbs stated, ". . . it's hard to come off the top of your head with something like that. It would be less just like anything else in '72, but—what amount less I don't know." When asked if the figure was within a 5 percent range of the cost in 1973, Gibbs stated, "Well, that could be as high as 10 percent. I was just making—you expect all these shoot from the hip answers."

Rod Ehman, an engineer and estimator who specializes in sewer and water storm drains, testified he looked at the 1972 site plan and that he inspected the property. Ehman estimated that in 1973, he would have contracted to install the sewer and water system for $24,000. The estimate was based on what he saw in the plans and on the site. Ehman was also working with a plan which had 28 spaces on it.

Finally, Jack Benson, construction estimator, estimated that the total construction cost to Soojian as of December 1977 was $115,018.11. This estimate was for work done on phase 1, the 28 units. Benson also stated it was conceivable that the total figure would be maybe 25 to 30 percent higher than the same work to be performed in 1973.

COUNTY'S EVIDENCE

Respondent county called a number of witnesses who testified on the purpose of a site plan, the second site plan approval, the amount of work done on the park, and the potential deleterious effect of the park.

Robert Grove, whose signature is found on the September 1, 1971, site plan, noted that approval of a site plan means that a particular plan meets the particular zoning requirements (e.g., for parking, landscaping or density); however, a building permit would give the approval to actually construct structures. He further testified that when the site plan is issued it is a permit in itself to go ahead and construct a park under the conditions of the site plan and "subject to those other requirements which are stipulated in that approval." Also, it is necessary to adhere to

the conditions of approval before actual construction, and one of those conditions was issuance of building permits from the State of California. However, after examining site plan No. 1507, Grove indicated that work which would not require a structural building permit could be done prior to the work which did require a permit.[4] However, he reiterated that the conditions were that building permits had to be issued.

Livingston testified that the site plan is simply an acknowledgement that what an applicant proposes complies with county ordinances, but that a person may not begin construction without the required permits. Another witness described the site plan "procedure" as a general plan showing dimensions, location of buildings, and sizes of lots, while a building permit shows greater detail, such as the "various structural components," and entitles a permittee to construct something according to specific plans. There was also testimony from the assistant director of public works that, according to California Administrative Code section 18035, construction of a mobile home park shall not be done unless a permittee has a valid permit and the code section also requires a building permit for the entire mobile home park and not just construction of buildings.

Bill Carmichael, who previously had responsibility for site plan reviews, testified it was intended that Soojian should be able to proceed with construction of the park.

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[4]Donald Livingston, Director of Planning for Fresno County, testified regarding site plans in general and stated that a person who possesses site plan approval must apply for some other permits before beginning construction.

Likewise, Livingston testified that as of 1971, Soojian had as a matter of right to proceed with the construction of the project according to the terms and conditions of the permit, assuming he met all of the conditions and secured and complied with the "permits." Livingston reiterated, "He [Soojian] had the right to get a permit."

There was also testimony regarding the second approval of the project. It may be remembered that on April 11, 1972, the zoning ordinance was amended to require a C.U.P. for a mobile home park. Nonetheless, on September 25, 1972, a site plan revision was approved by the county and nothing was said about a C.U.P.

The 1972 revised plan involved only minor revisions: the deletion of a space or spaces and the relocation of the laundry room and guest parking spaces.

Livingston, the director of planning, testified that the second plan was not considered a new site plan. When asked about the second approval subsequent to the 1972 ordinance requiring a C.U.P., Livingston explained, "I think it's a matter of policy the Department has always allowed minor modifications and made no substantive changes in a Site Plan, the way whether [*sic*] it was for conditional Use Permits or anything else because it was not considered to be a new Site Plan as long as it fell within the perimeters that were originally—." Livingston also stated that the 1971 site plan was still a valid site plan when asked whether he gave any consideration to the April 1972 ordinance prior to the subsequent approval of the 1972 site plan. Livingston also testified that it was not the policy of his department to notify citizens

of changes in zoning. Carmichael indicated that the changes were so minor in the revised plan that there was no consideration of the C.U.P. requirement. He also stated the approval of a revised plan commences from the date of the original plan.

The county also put on evidence regarding the amount of construction done on the site.

Carmichael testified that he was on the property in early 1977 on two occasions. In phase 1 there was rough grading, header boards along rough cut roads, a small portion of the required wall and piping in the ground, along with raw signs of piping sticking out of the ground at various locations. There was no development at all in phases 2 and 3 as there were weeds, rubble and piles of debris. Also, the right-of-way along Reed Avenue had not been dedicated as required by the site plan, the driveway approaches had not been constructed; the area had not been surfaced; there were no parking facilities or landscaping; however, a drainage plan had been filed.

Carmichael explained that according to the site plan approval letter and a county ordinance mentioned therein, Soojian had to dedicate the right-of-way to the county for road purposes before a building permit could issue. If a state permit were required to put in the sewer line, Soojian had no right to put in the line because he never made the dedication; according to a county zoning ordinance, the dedication had to be made prior to the issuance of any building permit.

Donald Pauls, a Fresno County building inspector, was at the park on several occasions and testified regarding

his visit on February 17, 1977. He had inspected several mobile home parks at various stages of development and, compared to other such parks, he classified the degree of development at the Soojian project as "nil." Pauls explained that there was not enough there to really represent what had to be done; "It is the first part of a construction and certainly would not be a substantial amount of work done." He saw sewer pipe fixtures ("stubs") but the "unit" was not ready for a mobile home to connect to it. He also saw some rough grading done on phase 1 but he did not see any grading on the entire tract. Pauls saw some header boards but made no attempt to compute the footage of sewer pipes. When asked about grapevines on phase 2 and 3, Pauls stated there was still some vines there but he was not sure about it "because I didn't have this entire map with me at the time. So I didn't know just where I was." Pauls originally thought the entire project was only phase 1, as the rest of it showed no sign of any improvement.

The county also put on evidence that the park would be incompatible with the surrounding agricultural area, that there are no urban services or commercial facilities in the area and that there would be pressure to develop such services.

Ronald Agmagian, the assistant agricultural commissioner in charge of issuing permits for restricted materials which include pesticides, testified the development could even further restrict the use of pesticides. ". . . urban encroachment upon an agricultural area would even more restrict the use of pesticides probably to the point where it couldn't be used in and around such development."

DISCUSSION

In this case, the trial court applied the independent standard of review. Under such standard, we need only review the record to determine as a matter of law whether the trial court's findings and conclusions lack support in the record. (*Billings v. California Coastal Com.* (1980) 103 Cal.App.3d 729, 734.) Upon reviewing the evidence received by the trial court, including the record of the administrative proceeding, we conclude, for reasons hereinafter stated, that the findings are supported by substantial evidence.

We now examine Soojian's successive contentions in light of the applicable law and recite the factual evidence surrounding each of the issues raised.

I

The trial court concluded as a matter of law that Soojian did not have a vested right to complete the mobile home park described in site plan review No. 1507. The gist of the findings of fact in support of this conclusion was that the degree of Soojian's development was insubstantial, and that much of the work was done without the proper permits

The crux of Soojian's argument is that his site plan constituted a building permit, he performed substantial work pursuant to the permit and, as a result, he has a vested right or is exempt from any changes in county ordinances.

County basically argues that the site plan was not a building permit and that Soojian has no vested right.

Generally, the doctrine of vested rights protects property owners from changes in zoning or other land use regulations which occur before the completion of the owner's development project. (*Tosh v. California Coastal Com.* (1979) 99 Cal.App.3d 388, 392, citing *Russian Hill Improvement Assn. v. Board of Permit Appeals* (1967) 66 Cal.2d 34, 49.) It is also recognized that the basis for the vested rights doctrine is estoppel. (*Patterson v. Central Coast Regional Com.* (1976) 58 Cal.App.3d 833, 844.)

The *Patterson* court also stated:

> "Where an owner of property, in good faith reliance upon a governmental representation that construction is fully approved, has suffered substantial detriment by proceeding with development, the government is estopped from prohibiting the project by a subsequent change in law. [Citations.] 'Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel.' [Citations.] '[U]nless the owner possesses *all* the necessary permits, the mere expenditure of funds or commencement of construction does not vest any rights in the development.' [Citation.]
>
> "It may be true that '[a]lthough the cases speak of vested rights in terms of reliance upon a *building permit* . . . a building permit may no longer be a *sine qua non* of a vested right. . . . [U]nder modern land development practices various governmental approvals are required before the issuance of a building permit, each approval pertaining to different aspects of the project, and . . . a vested right might arise before the issuance of a building permit if the preliminary permits approve a specific project and contain all final discretionary approvals required for

completion of the project.'" (*Patterson v. Central Coast Regional Com., supra*, 58 Cal.App.3d at p. 844.)

The leading Supreme Court authority on the subject of vested rights is *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785. In *Avco*, a developer applied to the coastal commission for an exemption from the permit requirements of the Coastal Act, claiming it had a vested right to complete a development (i.e., construct buildings). Avco had final map approvals, a rough grading permit and other county approvals to which Avco had expended considerable sums for the development of a tract. However, Avco had not applied for a building permit and, on the date the 1972 Coastal Act became effective, the county had not approved, nor did it know the dimensions of the buildings, the number, the location, etc. (*Id.*, at p. 794.)

The *Avco* court began by stating the general rule: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." (*Id.*, at p. 791.)

In a rather protracted analysis, the court concluded that *Avco* did not have a common law vested right. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d at pp. 797-798.) The court relied on two older intermediate appellate court cases (*Spindler Realty Corp. v. Manning* (1966) 243 Cal.App.2d 255 and

Anderson v. City Council (1964) 229 Cal.App.2d 79) as "controlling." (*Avco, supra,* at p. 793.)

> "[Those cases] stand for the proposition that neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued." (*Avco, supra,* 17 Cal.3d at p. 793.)

With this background, we first examine whether a site plan can be the basis for a vested right. We think not.

Soojian contends his site plan approval was an "entitlement for use" of his land for a detailed project, since there was no time limit on the site plan and certain improvements could be legally done prior to structural improvements which required a state permit. He contends the site plan approval qualified as a "permit" for purposes of the Mobile Home Park Act which required a permit to construct a mobile home park. He further contends the site plan is distinguishable from *Avco,* as the site plan specifically described the buildings on "precisely defined locations."

Until January 1, 1975, when the county assumed responsibility, the State Department of Housing and Community Development was in charge of issuing building permits and supervising the construction of mobile home parks in California pursuant to the Mobile Home Park Act found in Health and Safety Code section 18200 et seq.

Health and Safety Code section 18500 provides in relevant part: "It is unlawful for any person to do any of the following unless he has a valid permit issued by the enforcement agency: (a) Construct a mobile home park."

Health and Safety Code section 18300 provided in pertinent part that the Mobile Home Park Act would supersede any ordinance by the county; however, the county could, within reasonable exercise of its police powers, prohibit mobile home parks in certain zones.

Health and Safety Code section 18509 provides that construction permits automatically expire within six months where construction has not been completed; provided, however, the enforcement agency may extend the expiration date.

Notwithstanding Soojian's contentions to the contrary, we hold the terms of Health and Safety Code section 18500 preclude the site plan from being a "permit" within the act. Moreover, the site plan itself required structural permits from the state before construction, and Health and Safety Code section 18500 itself made unlawful any construction before a state permit was obtained.

The testimony of Robert Grove, who signed the site plan approval, indicated that under the site plan Soojian could perform certain nonstructural work which did not

require a state permit. However, notwithstanding what Grove may have stated, we believe, under the terms of the site plan and Health and Safety Code section 18500, Soojian needed a state permit *before* construction of the mobile home park. (*Patterson v. Central Coast Regional Com., supra,* 58 Cal.App.3d 833, 845.)

Additionally, there was considerable testimony that the site plan was not a building permit. Rather, the evidence showed that the site plan was merely an acknowledgement that the proposed use conformed with the applicable zoning ordinances. There was also testimony that Soojian would need other permits *before* construction and the site plan merely gave Soojian a right to obtain those permits. Grove himself testified it was necessary for Soojian to adhere to the conditions of approval *before* actual construction, and one of those conditions was the issuance of state permits.

Since the evidence demonstrates that the site plan was not a building permit or even a permit under the Mobile Home Park Act, there could be no vested right. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d 785; *Hill Homeowners Assn. v. City of Passaic* (1978) 156 N.J. 505 [384 A.2d 172, 175].)

Nevertheless, Soojian contends that his site plan was specific in its description of the project, unlike the developer's plan in *Avco.* Soojian fails to note that there was testimony that the site plan is more general and not specific like a building permit. Even if the site plan were sufficiently specific and detailed, Soojian still needed a state permit to construct the park. Without such a permit,

Health and Safety Code section 18500 made any construction work on the project unlawful. Moreover, by the time the state permits expired, no structures had been built and more work needed to be done on the plumbing. Any work which was done after the state permits expired in June 1974 and which required a specific permit could not be legal because no permit authorized it. (See Health & Saf. Code, §§ 18509, 18500.)[5]

Although Soojian, a licensed contractor who presumably knew of the need to obtain all necessary permits, did obtain the state permit authorizing a 28-space mobile home park, he did not complete the project by June 1974 (the expiration date of the state permits), and he did not obtain new or revised permits from the county. Where no such permits have been issued, we find it difficult to conceive of any basis for estopping the government by granting a vested right. (*Patterson v. Central Coast Regional Com., supra*, 58 Cal.App.3d 833, 844.)[6]

Furthermore, by the time Soojian received the state permit, the county had already enacted the C.U.P. ordinance.

Soojian contends that his project was not subject to the conditional use permit requirement *or* CEQA as the find-

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[5]We note that issuance of a permit to construct a mobile home park is both discretionary and ministerial. (*People v. Department of Housing and Community Dev.* (1975) 45 Cal.App.3d 185, 192-193.) We reject Soojian's argument that the site plan approval was the final discretionary act.

[6]Because we hold that the site plan conferred no basis for a vested right, we do not discuss any issues relating to Soojian's reliance on the site plan. Any such work was preparatory and could not form the basis for a vested right.

ings intimated. He contends his site plan was an "entitlement for use" and thereby exempt from CEQA (Pub. Resources Code, § 21169). Inferentially, he argues that the conditional use permit ordinance would not apply. He also contends the county waived any environmental assessment as required by the C.U.P. ordinance because of the second approval of the site plan after the ordinance went into effect. We are not persuaded.

First, the Supreme Court has quite clearly stated that a governmental body may not waive the requirements of an ordinance enacted for the public benefit. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 727.) Thus, there could be no waiver of the C.U.P. requirement, despite the approval of the revised site plan.

Second, it is difficult to see how the CEQA argument relates to an exemption from the C.U.P. ordinance. As the county argues, Soojian could very well be exempt from CEQA without being exempt from the local ordinance.

It is also doubtful that Soojian was exempt from CEQA. Although it is true that under Public Resources Code section 21169 projects approved prior to December 5, 1972, and the issuance of any "entitlement for use" issued before December 5, 1972, would exempt a project from CEQA, the project here was *not* approved by the *state* until December 18, 1972. Moreover, the site plan would not qualify as an entitlement because the state still had to perform the discretionary act of issuing the mobile home park permit. (Compare *Friends of Lake Arrowhead v. Board of Supervisors* (1974) 38 Cal.App.3d 497, 509, and *People v. County of Kern* (1974) 39 Cal.App.3d 830, 840.)

The fact that Soojian was subject to the C.U.P. ordinance, and CEQA as well, coupled with his failure to obtain a C.U.P., provides further support to uphold the judgment.

Finally, we find Soojian's reliance on *Morgan v. County of San Diego* (1971) 19 Cal.App.3d 636 misplaced. In *Morgan*, the county, as the enforcement agency under the Mobile Home Park Act, issued a permit to build a mobile home park on December 26, 1970, which, unless renewed, would expire six months later. The county also told the developers that if they were dilatory a time extension on the permit would not be granted. The developers did some work. They then went to the director of building inspection to tell him of some financing problems and were not in the position to start immediately. The county told the developers on April 20, 1971 (with two months remaining within which construction could have proceeded to protect the permit), not to spend any more money until they heard from county counsel. On May 8, 1971, county wrote to the developers stating there was no reasonable basis to grant an extention of the permit because the amount of construction which had taken place did not justify it and "'[t]he construction effort [had] been dilatory, rather than diligent.'" The court held[1] that, as a matter of law, the county estopped from asserting that the construction effort was dilatory since the county's actions could well have been a substantial reason why no further construction occurred. As another basis for finding that the building inspector abused his discretion in failing to renew the permit, the

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[1]We note in *Morgan* the county conceded on appeal that the evidence supported the findings but argued the findings do not justify the conclusions.

court held the county inspector's mere visual site inspection was unreasonable because, in a complex project, much work is done off-site and on drawing boards and in governmental agencies; thus, the permit had to issue.

In the instant case, it is true that the county inspectors only conducted an on-site visual inspection. Although we are aware that Soojian also had to do off-site work, we believe the distinguishing feature between *Morgan* and the instant case is that in *Morgan*, the off-site work, along with some on-site construction (underground plumbing, putting in a concrete slab for a laundry) was done pursuant to the necessary permit but was stopped at the county's request after the permit had been obtained. Here, although a portion of the on-site construction was done pursuant to the building permit, a substantial portion of the work was done without any building permit. Moreover, Soojian was not misled by the county as the developer was in *Morgan* in the sense that the county did not prevent Soojian from completing his project until the ultimate revocation.

II

The trial court found that Soojian was afforded a full and fair hearing before the board of supervisors. The evidence supports its conclusion.

Soojian posits a series of contentions relating to due process which we shall consider seriatim.

Relying on the procedural due process cases (among them, *Fuentes v. Shevin* (1972) 405 U.S. 233), Soojian contends that there was no notice and hearing prior to the

department of public works' revocation of the site plan. He claims a letter written by William Carmichael dated January 18, 1977, notifying him that the department of public works planned to revoke the site plan because substantial work had not been commenced was not valid notice. We disagree.

Carmichael's letter notified Soojian that the building permits had expired in "July 1974" and no new permits had been issued. The letter stated that the zoning had been changed to exclusive agricultural and work had apparently ceased prior to the expiration of the permits. Because of the change in zoning, expiration of permits and cessation of work on the project should be removed from the books. Soojian was advised to contact the public works office, which he did.

Due proces requires reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.)

Since we have concluded that the site plan conferred no basis for a vested right, there was no deprivation of a property interest by the department of public works. Soojian still had to establish a claim of a vested right. Prior to this time, he was not deprived of any property interest; thus, there was no due process violation.

Soojian then contends he was not told prior to any administrative hearing the basis for the site plan revocation, citing *Morgan v. United States* (1938) 304 U.S. 1. He also contends that he was treated unfairly; county counsel

improperly acted as both prosecutor and judge; county counsel erroneously instructed the board that if it wanted judicial review it had to decide against Soojian; and the board refused to discuss Soojian's counterfindings, although they discussed county counsel's findings. He asks us to consider the county's instructions to the board and various rulings (but he does not point to any "contention" of error). He claims the instructions erroneously led the board to falsely assume his work had been performed without the necessary permits and most of the work would not count toward acquisition of a vested right. We are not persuaded.

In *Morgan v. United States, supra,* 304 U.S. 1, 18-19, the Supreme Court stated, "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be thoroughly advised what the Government proposes and to be heard upon its proposals before it uses its final command."

Although there was no specific complaint in the instant case, Soojian was advised in part of the bases of the site plan revocation. He was told by a county counsel letter dated March 1, 1977, that substantial development had not taken place to create a vested right and, since the general plan no longer permitted mobile home parks, building permits would not be issued for that proposed use.

In an administrative proceeding, it has been held that notice need not meet all the requirements necessary for a valid complaint in an action at law. It is required only to adequately disclose the charges to allow the accused to

prepare a defense and not to be disadvantaged by surprise at the hearing. (*Wisuri v. Newark School Dist.* (1966) 247 Cal.App.2d 239, 242.)

Despite the generality of the notice, Soojian claims no surprise or prejudice. Thus, any defect would not constitute reversible error.

As to the objection to county counsel's being both judge and prosecutor, here a deputy county counsel defended the department of public works while county counsel advised the board of supervisors. Such a procedure is proper, inasmuch as no member of the county counsel's office served in a dual capacity as both adviser and advocate. (*Rowen v. Workers' Comp. Appeals Bd.* (1981) 119 Cal. App.3d 633, 640-641; *Ford v. Civil Service Commission* (1958) 161 Cal.App.2d 629, 697.)

Regarding any instructional error, we believe our discussion of the vested rights issue adequately addresses Soojian's contentions.

Soojian then contends that an article in a local newspaper allegedly written shortly after the January 4, 1977, hearing revealed improper ex parte communications.

We find no evidence in the record other than the article regarding the ex parte communications. In light of the lack of evidence, there was no due process violation. (Cf. *Camero v. United States* (1967 Ct. Cl.) 375 F.2d 777, 779 relied on by Soojian [ex parte contacts amply supported by the evidence].)

III

Soojian contends (although he does not cite to the record in support of this claim) that the county is estopped to apply the conditional use permit ordinance because he was advised by the county staff that he did not need a conditional use permit. He further contends that the second approval constituted a waiver and he relied to his detriment on the site plan, claiming that the county is estopped from revoking the site plan, as the county knew that the project had gotten under way, causing him a severe economic loss.

County contends that Soojian came into equity in bad faith and with unclean hands, listing as an example that after the tentative board of supervisors rejection Soojian "began massive development." Relying on *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813, the county claims estoppel should not lie as there is a strong public interest in zoning and land use control, and further, that even if the second site plan approval was unreasonable, the public interest in land use control is of paramount importance.

The existence of an estoppel is generally a question of fact unless the opposite conclusion is the only one that can be drawn from the evidence. When the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question of law. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.)

Generally speaking " 'four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he

must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury.' " (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

It is equally well settled that a doctrine will not be applied against the government if to do so would effectively nullify " 'a strong rule of policy, adopted for the benefit of the public.' " (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at p. 493; see also, *Pettitt v. City of Fresno, supra,* 34 Cal.App.3d 813, 822-823 [zoning]; *People v. County of Kern, supra,* 39 Cal.App.3d 830, 838 ["Only in rare and unusual circumstances will the doctrine of estoppel be invoked against a public agency to prevent enforcement of a zoning ordinance."].)

Estoppel will not apply against a government official to deny the validity of a permit or other representations respecting the use of property issued or made in violation of the express provisions of a zoning ordinance. (*Pettitt v. City of Fresno, supra,* 34 Cal.App.3d 813, 819.)

Finally, the principles of equitable estoppel cannot be applied to deprive the public of protection of a statute because of a mistake in action or lack of action on the part of public officials. (*Jacques, Inc. v. State Bd. of Equalization* (1957) 155 Cal.App.2d 448, 462.)

Here, there are equities on both sides. Soojian clearly relied on the site plan approval to build his mobile home park. However, as a licensed contractor, Soojian should

have known that he needed structural and plumbing permits after the state permits expired. Moreover, his initial reliance on the site plan was not justified because he had not yet received state approval for the project. Finally, the strong interest in land use control outweighs Soojian's equities. Although this is a harsh result, the strong public interest in land use control cannot be ignored.

IV

Soojian then contends that, despite his work, the county took no action until 1977 to stop the development and that fairness dictates that laches be applied. He relies on dicta in *Friends of Lake Arrowhead v. Board of Supervisors*, *supra*, 38 Cal.App.3d 497, 515, fn. 14: "[¶] It is possible that approval of the site development plan constituted a significant point of approval of the project. If so, an attack upon such approval might have been barred by laches."

He also contends that CEQA could not apply because Public Resources Code section 21167 provides for a 180-day statute of limitations to attack a public agency's approval of a project which may have a significant effect on the environment.

He relies on *People v. Department of Housing and Community Dev.*, *supra*, 45 Cal.App.3d 185, 195-196.

At the outset, it appears Soojian did suffer prejudice by the delay. However, unlike the developer in *People v. Department of Housing and Community Dev.*, *supra*, 45 Cal. App.3d 185, 197-198, Soojian did not have all the necessary permits to complete construction. Moreover, the project did

not conform to the local zoning; there was opposition to the development and there were no official assurances that further permits were unnecessary.

Although we recognize the hardship, we conclude that laches cannot be applied. Our conclusion is based upon considerations of public policy, conflicting evidence on the amount of development and Soojian's failure to obtain all the necessary permits and some evidence of bad faith.

V

Soojian finally contends that the trial court erred in failing to adopt certain findings which had been stipulated to. He contends that the trial court failed to adopt his requested findings which were supported by the evidence. We disagree.

The subject findings of which Soojian claims there was a stipulation involve four requested findings. Only requested findings Nos. 3 and 4 are relevant, and those findings provided that when site plan No. 1507 was approved the property was zoned A-1 and permitted, as a matter of right, the construction of a mobile home park as proposed by Soojian. No. 4 provided that "It is apparent from the testimony of Soojian and his family that they have made good faith attempts to work on this project."

Upon review of the transcript at the board of supervisors hearing on the adoption of the findings of fact and conclusions of law, we find that there was no stipulation. Although Mr. Lempel, the deputy county counsel representing the department of public works, apparently stated that the findings were agreed to, it is clear that he did not

mean to stipulate that Soojian acted in good faith. Reviewing the record, we find Lempel argued that Soojian was guilty of bad faith.

The judgment is affirmed.

/s/ ZENOVICH
Acting P.J.

WE CONCUR:

/s/ ANDREEN
J.

/s/ WOOLPERT (W.R.)
J.*

*Assigned by the Chairperson of the Judicial Council.

Appendix I

In the Superior Court of the State of California
In and for the County of Fresno
No. 227791-1

Asadoor Soojian, Petitioner,

vs.

County of Fresno, et al., Respondents.

[Filed June 19, 1979]

JUDGMENT

Upon the Findings of Fact and Conclusions of Law made by the Court on June 18, 1979, Judgment is hereby entered in favor of respondents the County of Fresno; the Board of Supervisors of the County of Fresno, Members: John R. Donaldson, John Ventura, Bruce Bronzan, Sharon Levy; the Board of Review of the County of Fresno, Members: Leo Wilson, Manuel Lopez, J. Harold Carter, Ed Darden, Sr., Wayne Dominick, Glee Ewell, Sally Fosse, Donald Schafer; the Office of County Counsel of Fresno County, Robert M. Wash, County Counsel, J. Steven Lempel, Chief Deputy County Counsel; the Department of Public Works of the County of Fresno, and the Planning Department of the County of Fresno and against petitioner Asadoor Soojian as follows:

1. The Petition for Administrative Mandamus be and it hereby is denied.

2. The Alternative Writ of Administrative Mandamus be and it hereby is discharged.

3. Respondents are awarded their costs.

Dated: June 18, 1979.

LEONARD I. MEYERS
Judge of the Superior Court

Appendix J

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Attorneys for Respondents

In the Superior Court
of the
State of California
In and for the County of Fresno
No. 227791-1

Asadoor Soojian,
Petitioner,

vs.

County of Fresno, et al.,
Respondents.

[Filed June 19, 1979]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court upon petitioner's Application for Writ of Administrative Mandamus pursuant to Code of Civil Procedure section 1094.5 and respondents' answer thereto. Petitioner was represented by William M. Hardy and the County of Fresno was represented by Floyd R. B. Viau, County Counsel, by J. Steven

Lempel, Chief Deputy. The case was tried before the Court on June 27, 1978, upon the transcripts and the record of administrative proceedings before the Board of Supervisors of the County of Fresno on November 7, 1977, December 8, 1977 and January 4, 1978. Upon the Court's independent review of all the evidence presented at the hearings, the Court adopts the following

FINDINGS OF FACT

Finding No. 1: The County of Fresno is a political subdivision, organized, existing, and subsisting under and by virtue of the laws of the State of California.

Finding No. 2: The administrative orders here under review are final administrative orders or determinations made by administrative officials, divisions, departments, agents and employees of the County of Fresno.

Finding No. 3: On August 4, 1971, Asadoor Soojian applied to the Planning Department of the County of Fresno for a site plan review of a 264 space mobilehome park to be constructed in three phases on a 33-acre parcel on the southwest corner of East Central and South Reed Avenues in the unincorporated area of the County of Fresno. On September 1, 1971, Site Plan No. 1507 was approved with conditions by the Director of the Fresno County Planning Department. Among the conditions, was the requirement that the property owner dedicate to the County of Fresno a 20-foot right of way along Reed Avenue and a turning radius at the corner of Reed and Central Avenues prior to issuance of any building permits. The Site Plan Approval also stated that building permits were

necessary prior to petitioner performing any construction work on the site. At the time of such approval, the property was zoned A-1, and the mobilehome park use was permitted there as a matter of right.

Finding No. 4: After the Site Plan Approval was obtained, preliminary work on design, including on site measurements and some staking of sewer lines and road areas, was done by petitioner and members of his family.

Finding No. 5: At the time of issuance of Site Plan No. 1507 and until December 31, 1974, the Department of Housing and Community Development of the State of California was the agency responsible for issuing building permits and supervising the construction of mobilehome parks throughout the State of California. As of January 1, 1975, such responsibility was transferred to local governmental agencies.

Finding No. 6: On April 11, 1972, the Fresno County Zoning Ordinance was amended to require that mobilehome park developments be subject to the Conditional Use Permit process (Fresno County Zoning Ordinance Code, Section 843). Petitioner has never applied for or been issued a conditional use permit for a mobilehome park on the subject property.

Finding No. 7: On September 25, 1972, Site Plan No. 1507 was revised by petitioner to eliminate one mobilehome pad from the Site Plan. Such revision was approved by the Fresno County Planning Department. This revision was extremely minor and insignificant with regard to Site Plan No. 1507. For that reason, the Planning Department did not restudy the project and did not affirmatively advise

petitioner of the requirement to apply for a conditional use permit. This procedure was entirely proper and reasonable in light of the insignificant nature of the revision.

Finding No. 8: On December 5, 1972, Public Resources Code, Section 21169, became effective in the State of California. This law required that private projects subject to discretionary approval by a governmental agency, also be subject to the California Environmental Quality Act of 1970, Public Resources Code, Section 21000, et seq.

Finding No. 9: The conditional use permit process is a procedure for the issuance of a discretionary land-use permit by the Board of Supervisors of the County of Fresno. The conditional use permit process includes an environmental assessment. In the event significant environmental impacts are identified during the environmental assessment, an environmental impact report (EIR) is also required. An environmental assessment was never prepared for the subject property.

Finding No. 10: On December 18, 1972, the State of California issued two building permits for the construction of a 28-space mobilehome park and a 16 x 30 wash building on Phase I of the subject site. Such building permits expired on June 18, 1973, without completion of the construction. In November, 1973, the State extended both permits until June 18, 1974.

Finding No. 11: During the period that such building permit was in effect, petitioner installed approximately 1430 feet of sewer pipe and 1400 feet of water pipe in the area designated as Phase I on Site Plan No. 1507. Such Phase I area is shown in Site Plan No. 1507 in yellow. It

is a five-acre portion of the 33-acre site and contains 28 mobilehome spaces. This work was performed by Mr. Soojian and members of his family. The actual cost of installing such pipe was not provided by petitioner, and indeed, he testified that he had no bills, records or any documentation whatsoever which would indicate the cost of such work. Petitioner relied on the testimony of himself and other contractors in the Fresno area to show the cost of installing such pipe in 1977. There was other testimony relating to the cost of such pipe in 1973. That witness, however, was unfamiliar with the cost of labor or the cost of using equipment in 1973. The Board of Supervisors found such testimony unreliable and not indicative of the actual cost to petitioner in 1972-73. The sewer and water pipes were approved, as installed, by an inspector of the State Department of Housing and Community Development on November 12, 1973, (sewer) and early 1974 (water).

Finding No. 12: During the years 1972, 1973, 1974 and 1975, petitioner installed approximately 1670 feet of redwood header boards on the subject property. One-half of such work was performed in 1973 and the remainder distributed evenly between 1972, 1974 and 1976. No portion of such work was inspected or approved by a building inspector. The evidence was not convincing that the value of the work was $2,000.

Finding No. 13: During the period between September 30, 1971, and January 30, 1972, petitioner claims that he performed on-site construction staking and surveying. He claims that it took a total of four months for two people working fifty hours a week to perform such work, at a total

value of $22,000. The Board of Supervisors did not credit this testimony and considered that such construction staking and surveying should not reasonably have required more than two or three days, if done by a licensed surveyor. Inspections by representatives of the County of Fresno in December, 1976, February, 1977, and May, 1977, revealed no evidence of any construction stakes anywhere on the 33-acre site.

Finding No. 14: Disconnected sections of masonry wall were installed parallel to Reed Avenue during the years 1971, 1972 and 1975. A total of approximately 128 feet were installed during this period, of which 32 feet were installed in 1975. The Board of Supervisors did not accept the claim that the cost of installing such 128 feet of wall was $6,400 in light of the failure to present any bills, records or other documentation supporting such cost.

Finding No. 15: On April 4, 1975, petitioner purchased a water pump in the sum of $2,300, which was installed in the existing agricultural well located adjacent to Central Avenue.

Finding No. 16: Petitioner did not intend to abandon the project.

Finding No. 17: No other work was performed on the subject property until July 1, 1977, two days after this Board of Supervisors tentatively denied petitioner's first appeal. At such time, petitioner installed additional masonry wall along Reed Avenue, a new water well, concrete and asphalt paving and curbs, landscaping, grading and other miscellaneous construction. All such work was done

without building permits, and the County Building Inspector issued a stop work order to halt the project.

Finding No. 18: On August 15, 1974, the Fresno County Zoning Ordinance was amended to include the following:

> "Approved site plans shall become void when substantial development has not commenced within one year of approval of the site plan."

(Fresno County Zoning Ordinance Code, Section 874-A-7)

Accordingly, Site Plan No. 1507 lapsed on August 15, 1975, unless substantial development had commenced prior to that date. Prior to August 15, 1974, there was no expiration period for Site Plans.

Finding No. 19: On September 30, 1976, the subject property was rezoned from A-1 to AE-20 (Exclusive Agricultural—20-acre Minimum). Mobilehome parks are not permitted in any AE Zone District.

Finding No. 20: As a result of such rezoning, William Carmichael of the Department of Public Works of the County of Fresno contacted petitioner in January 1977, to inquire his intentions with regard to Site Plan No. 1507. After investigation and discussions with Mr. Soojian and members of the County Counsel's Office, petitioner was advised by letter dated March 1, 1977, that Site Plan No. 1507 was revoked by reason of petitioner's failure to commence substantial development within one year of August 15, 1974.

Finding No. 21: Pursuant to such notice, petitioner appealed the decision of the Department of Public Works

to the Board of Review of the County of Fresno. On May 4, 1977, the Board of Review sustained the Department of Public Works' decision by a vote of 8-0. The members of the Board of Review were: Leo Wilson, Manuel Lopez, J. Harold Carter, Ed Darden, Sr., Wayne Dominick, Gl·· Ewell, Sally Fosse, Donald Schafer and Msgr. P. V. Flood (absent). Petitioner then appealed to the Board of Supervisors.

Finding No. 22: On March 6, 1978, the Board of Supervisors affirmed the decision of the Board of Review dated May 4, 1977, and adopted its Resolution No. 78-463, Making Findings of Fact and Revoking Site Plan Approval 1507. A copy of such resolution is attached hereto and marked Exhibit "A".

Finding No. 23: All of the work that was done on the site, except for the work on the water well, was limited to the area shown in yellow on the site plan map (Phase I). Such area comprises 28 of the proposed 264 spaces in the trailer park. Accordingly, work was done on only 11% of the site. No work except some on site engineering has been completed or even begun on the remaining 89% of the site.

Finding No. 24: During the entire time between September 1, 1971, and March 1, 1977, petitioner constructed only about 128 feet of disconnected masonry wall, whereas, the site plan requires 4774 feet of solid masonry wall or chain link fence with solid vegetation screen; no paving whatsoever was installed anywhere on the site; there was no construction whatsoever of the 290 parking spaces required in Site Plan No. 1507; the 20-foot right of way

and corner radius along Reed Avenue were not dedicated to the County as required by the Site Plan; there was no landscaping installed anywhere on the site as required in the Site Plan; there was no construction of the 263 trailer pads shown in the Site Plan; the three laundry rooms shown in the Site Plan had not been built or begun; the recreation area shown in the Site Plan had not been built or begun; the existing water well on the site is inadequate for the proposed use and no new well was constructed; no work has commenced on a sewer treatment facility to serve the proposed trailer park; and no utility services were brought onto the site.

Finding No. 25: Less than 10% of the work to be done in Phase I had been commenced as of February 1977. Accordingly, less than one percent of the project had been commenced as of that date; less than one percent had commenced as of June 18, 1974; and virtually nothing had been done as of December 18, 1972.

Finding No. 26: No building, grading or other construction permit of any kind was ever issued to petitioner by the County of Fresno.

Finding No. 27: During the times relevant to this matter, petitioner, a licensed general contractor, was aware of the requirement to obtain a building permit prior to the commencement of any construction work.

Finding No. 28: All work performed on the site between September 1, 1971, and December 18, 1972, was done without any building or construction permit. All work performed on the site after June 18, 1974, was done without any building or construction permit.

Finding No. 29: The purpose of the Conditional Use Permit process, the California Environmental Quality Act, the zoning and planning laws and ordinances of the County of Fresno, and the building permit process are to protect the public from the harmful effects of unrestricted land use.

Finding No. 30: Petitioner's 33-acre mobilehome park site is located on prime agricultural land; it is far removed from all urban centers and urban services; it adjoins valuable vineyards and orchards; and the owners of such adjoining and neighboring lands will be detrimentally affected in the event a mobilehome park is established on the subject site.

Finding No. 31: The public interest in protecting prime agricultural land from urban encroachment is of paramount importance, and far outweighs any loss or inconvenience that may be suffered by petitioner as a result of the loss of his investment.

Pursuant to the foregoing Findings, the Court adopts the following

CONCLUSIONS OF LAW

1. Petitioner did not establish a vested right to complete the development described in Site Plan Review No. 1507.

2. Petitioner was afforded a full and fair hearing before the Board of Supervisors.

3. The Board of Supervisors did not proceed without or in excess of its jurisdiction.

4. The Board of Supervisors proceeded in the manner required by law.

5. The decision of the Board of Supervisors is supported by the findings.

6. The findings of the Board of Supervisors are supported by the evidence in the record.

7. Judgment should be entered in favor of respondents the County of Fresno; the Board of Supervisors of the County of Fresno, Members: John R. Donaldson, John Ventura, Bruce Bronzan, Sharon Levy; the Board of Review of the County of Fresno, Members: Leo Wilson, Manuel Lopez, J. Harold Carter, Ed Darden, Sr., Wayne Dominick, Glee Ewell, Sally Fosse, Donald Schafer; the Office of County Counsel of Fresno County, Robert M. Wash, County Counsel, J. Steven Lempel, Chief Deputy County Counsel; the Department of Public Works of the County of Fresno, and the Planning Department of the County of Fresno and against petitioner Asadoor Soojian as follows:

a. The Petition for Writ of Administrative Mandamus be and it hereby is denied.

b. The Alternative Writ of Administrative Mandamus be and it hereby is discharged.

c. Respondents are awarded their costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 14, 1979.

LEONARD I. MEYERS
Judge of the Superior Court

Appendix K

Before the Board of Supervisors
of the County of Fresno
State of California

In the Matter of
Site Plan Review No. 1507-
Asadoor Soojian

RESOLUTION MAKING FINDINGS OF FACT AND REVOKING SITE PLAN APPROVAL 1507

This matter came before the Board of Supervisors of the County of Fresno pursuant to an appeal by Asadoor Soojian from a decision of the Board of Review of the County of Fresno on May 4, 1977, revoking Site Plan No. 1507. The appeal was originally heard by four members of this Board on June 28, 1977. At the conclusion of that hearing, the Board voted three to one to revoke Site Plan 1507 and directed the County Counsel to prepare Findings of Fact. Prior to the adoption of such Findings, one Board member changed her mind with regard to the appeal, thus, necessitating a new hearing before the full five-member Board. Such rehearing was heard before the full Board on November 7, 1977, December 8, 1977, and January 4, 1978, as a de novo proceeding. Upon the evidence presented at such rehearing, the Board herein makes the following Findings of Fact:

Finding No. 1: On August 4, 1971, Asadoor Soojian applied to the Planning Department of the County of Fresno for a site plan review of a 264 space mobilehome park to be constructed in three phases on a 33-acre parcel

on the southwest corner of East Central and South Reed Avenues in the unincorporated area of the County of Fresno. On September 1, 1971, Site Plan No. 1507 was approved with conditions by the Director of the Fresno County Planning Department. Among the conditions, was the requirement that the property owner dedicate to the County of Fresno a 20-foot right of way along Reed Avenue and a turning radius at the corner of Reed and Central Avenues prior to issuance of any building permits. The Site Plan Approval also stated that building permits were necessary prior to Applicant performing any construction work on the site. At the time of such approval, the property was zoned A-1, and the mobilehome park use was permitted there as a matter of right.

Finding No. 2: At the time of issuance of Site Plan No. 1507 and until December 31, 1974, the Department of Housing and Community Development of the State of California was the agency responsible for issuing building permits and supervising the construction of mobilehome parks throughout the State of California. As of January 1, 1975, such responsibility was transferred to local governmental agencies.

Finding No. 3: On April 11, 1972, the Fresno County Zoning Ordinance was amended to require that mobilehome park developments be subject to the Conditional Use Permit process (Fresno County Zoning Ordinance Code, Section 843). The Applicant has never applied for or been issued a conditional use permit for a mobilehome park on the subject property.

Finding No. 4: On September 25, 1972, Site Plan No. 1507 was revised by the Applicant to eliminate one mobilehome pad from the Site Plan. Such revision was approved by the Fresno County Planning Department. This revision was extremely minor and insignificant with regard to Site Plan No. 1507. For that reason, the Planning Department did not restudy the project and did not affirmatively advise Applicant of the requirement to apply for a conditional use permit. This procedure was entirely proper and reasonable in light of the insignificant nature of the revision.

Finding No. 5: On December 5, 1972, Public Resources Code, Section 21169, became effective in the State of California. This law required that private projects subject to discretionary approval by a governmental agency, also be subject to the California Environmental Quality Act of 1970, Public Resources Code, Section 21000, et seq.

Finding No. 6: The conditional use permit process is a procedure for the issuance of a discretionary land-use permit by the Board of Supervisors of the County of Fresno. The conditional use permit process includes an environmental assessment. In the event significant environmental impacts are identified during the environmental assessment, an environmental impact report (EIR) is also required. An environmental assessment was never prepared for the subject property.

Finding No. 7: On December 18, 1972, the State of California issued a building permit for the construction of a 28-space mobilehome park and a 16 × 30 wash build-

ing on Phase I of the subject site. Such building permit expired on June 18, 1973, but was extended until June 18, 1974.

Finding No. 8: During the period that such building permit was in effect, Applicant installed approximately 1430 feet of sewer pipe and 1400 feet of water pipe in the area designated as Phase I on Site Plan No. 1507. Such Phase I area is shown in Site Plan No. 1507 in yellow. It is a five-acre portion of the 33-acre site and contains 28 mobilehome spaces. This work was performed by Mr. Soojian and members of his family. The actual cost of installing such pipe was not provided by the Applicant, and indeed, he testified that he had no bills, records or any documentation whatsoever which would indicate the cost of such work. Applicant relied on the testimony of himself and other contractors in the Fresno area to show the cost of installing such pipe in 1977. There was other testimony relating to the cost of such pipe in 1973. That witness, however, was unfamiliar with the cost of labor or the cost of using equipment in 1973. The Board finds such testimony unreliable and not indicative of the actual cost to Applicant in 1972-73. The sewer and water pipes were approved by an inspector of the State Department of Housing and Community Development.

Finding No. 9: During the years 1972, 1973, 1974 and 1975, Applicant installed approximately 1670 feet of redwood header boards on the subject property. One-half of such work was performed in 1973 and the remainder distributed evenly between 1972, 1974 and 1976. No portion of such work was inspected or approved by a building in-

spector. Applicant attributes a $2,000.00 value to such work as of December 1977, and again he was unable to submit any bills, records or documentation indicating the actual costs.

Finding No. 10: During the period between September 30, 1971, and January 30, 1972, Applicant claims that he performed on-site construction staking and surveying. He claims that it took a total of four months for two people working fifty hours a week to perform such work, at a total value of $22,000.00. The Board does not credit this testimony and considers that such construction staking and surveying should not reasonably have required more than two or three days, if done by a licensed surveyor. Inspections by representatives of the County of Fresno in December, 1976, February, 1977, and May, 1977, revealed no evidence of any construction stakes anywhere on the 33-acre site.

Finding No. 11: Disconnected sections of masonry wall were installed parallel to Reed Avenue during the years 1971, 1972 and 1975. A total of approximately 128 feet were installed during this period, of which 32 feet were installed in 1975. The Board does not accept the claim that the cost of installing such 128 feet of wall was $6,400.00 in light of the failure to present any bills, records or other documentation supporting such cost.

Finding No. 12: On April 4, 1975, Applicant purchased a water pump in the sum of $2,300.00, which was installed in the existing agricultural well located adjacent to Central Avenue. The Fresno County Health Department had previously determined that such well was unfit for use by humans.

Finding No. 13: No other work was performed on the subject property until July 1, 1977, two days after this Board denied Applicant's first appeal. At such time, Applicant installed additional masonry wall along Reed Avenue, a new water well, concrete and asphalt paving and curbs, landscaping, grading and other miscellaneous construction. All such work was done without building permits, and the County Building Inspector issued a stop work order to halt the project.

Finding No. 14: On August 15, 1974, the Fresno County Zoning Ordinance was amended to include the following:

> "Approved site plans shall become void when substantial development has not commenced within one year of approval of the site plan." (Fresno County Zoning Ordinance Code, Section 874-A-7)

Accordingly, Site Plan No. 1507 lapsed on August 15, 1975, unless substantial development had commenced prior to that date.

Finding No. 15: On September 30, 1976, the subject property was rezoned from A-1 to AE-20 (Exclusive Agricultural-20-Acre Mimimum). Mobilehome parks are not permitted in any AE Zone District.

Finding No. 16: As a result of such rezoning, William Carmichael of the Department of Public Works of the County of Fresno contacted Applicant in January, 1977, to inquire his intentions with regard to Site Plan No. 1507. After investigation and discussions with Mr. Soojian and members of the County Counsel's Office, Applicant was advised by letter dated March 1, 1977, that Site Plan No.

1507 was revoked by reason of Applicant's failure to commence substantial development within one year of August 15, 1974.

Finding No. 17: Pursuant to such notice, Applicant appealed the decision of the Department of Public Works to the Board of Review of the County of Fresno. The Board of Review sustained the Department of Public Works decision by a vote of 8-0. Applicant then appealed to the Board of Supervisors.

Finding No. 18: All of the work that was done on the site, except for the work on the water well, was limited to the area shown in yellow on the site plan map (Phase I). Such area comprises 28 of the proposed 264 spaces in the trailer park. Accordingly, work was done on only 11% of the site. No work has been completed or even begun on the remaining 89% of the site.

Finding No. 19: During the entire time between September 1, 1971, and March 1, 1977, Applicant constructed only about 128 feet of disconnected masonry wall, whereas, the site plan requires 4774 feet of solid masonry wall; no paving whatsoever was installed anywhere on the site; there was no construction whatsoever of the 290 parking spaces required in Site Plan No. 1507; the 20-foot right of way and corner radius along Reed Avenue were not dedicated to the County as required by the Site Plan; there was no landscaping installed anywhere on the site as required in the Site Plan; there was no construction of the 263 trailer pads shown in the Site Plan; the three laundry rooms shown in the Site Plan had not been built or begun; the recreation area shown in the Site Plan had not been

built or begun; the existing water well on the site is inadequate for the proposed use and no new well was constructed; no work has commenced on a sewer treatment facility necessary to serve the proposed trailer park; and no utility services were brought onto the site.

Finding No. 20: The Board adopts the characterization of the County Building Inspector who visited the site in February, 1977. As of that date, the extent of development was "nil". In quantifiable terms, the Board finds that substantially less than 10% of the work to be done in Phase I had been commenced as of that date. Accordingly, less than 1% of the project had been commenced as of that date; significantly less than 1% had commenced as of June 18, 1974; and virtually nothing had been done as of December 18, 1972. In relation to what is proposed for the site, as well as in absolute terms, very little progress had been made as of June 28, 1977.

Finding No. 21: No building, grading or other construction permit of any kind was ever issued to the Applicant by the County of Fresno.

Finding No. 22: During all times relevant to this matter, Applicant, a licensed general contractor, was aware of the requirement to obtain a building permit prior to the commencement of any construction work.

Finding No. 23: All work performed on the site between September 1, 1971, and December 18, 1972, was done without any building or construction permit. All work performed on the site after June 18, 1974, was done without any building or construction permit.

Finding No. 24: The purpose of the conditional use permit process, the California Environmental Quality Act, the zoning and planning laws and ordinances of the County of Fresno, and the building permit process is to protect the public from the harmful effects of unrestricted land use.

Finding No. 25: Applicant's 33-acre mobilehome park site is located on prime agricultural land; it is far removed from all urban centers and urban services; it adjoins valuable vineyards and orchards; and the owners of such adjoining and neighboring lands will be irreparably injured in the event a mobilehome park is established on the subject site.

Finding No. 26: The public interest in protecting prime agricultural land from urban encroachment is of paramount importance, and far outweighs any loss or inconvenience that may be suffered by Applicant as a result of the loss of his investment.

Pursuant to the foregoing Findings, the Board adopts the following Conclusions:

1. Fresno County Zoning Ordinance Code, Section 843 relating to the requirement for a conditional use permit for mobilehome parks in the A-1 Zone District, applied to the subject property as of April 11, 1972.

2. Since Applicant never applied for the required conditional use permit, all work subsequent to April 11, 1972, was illegal and unlawful.

3. The building permit issued by the State of California on December 18, 1972, was void and invalid for the following reasons:

(a) Applicant had failed to obtain a conditional use permit for the establishment of a mobilehome park on the subject property;

(b) Applicant had not dedicated the right of way along Reed Avenue as required in Site Plan No. 1507 as a precondition to issuance of any building permit; and

(c) Applicant failed to obtain an environmental assessment as required by Public Resources Code, Section 21169.

4. There was no substantial development of the site as of April 11, 1972.

5. Even if it is determined that the requirement for a conditional use permit did not apply to the property, there was no substantial development of the site as of December 18, 1972.

6. In the event that the building permit is determined to be valid, there was no substantial development of the site as of June 18, 1974.

7. As of August 15, 1975, there was substantial development of the area limited to Phase I of the site, but there was no substantial development with regard to the entire project at anytime.

8. Site Plan No. 1507 is hereby revoked for failure to have lawfully commenced substantial development of the project as of August 15, 1975.

THE FOREGOING RESOLUTION was passed and adopted by the following vote of the Board of Supervisors of the County of Fresno this 6th day of March 1978, to-wit:

AYES: Supervisors Ventura, Levy, Donaldson

NOES: Supervisor Johnson

ABSENT: Supervisor Bronzan

JOHN R. DONALDSON
Chairman, Board of Supervisors

ATTEST:

M. G. WINGETT, Clerk of the
Board of Supervisors
By GWENDOLYN JOHNSON
Deputy

Appendix L

County Counsel of Fresno County
Robert M. Wash
County Counsel
[Letterhead]
March 1, 1977

Mr. Asadoor Soojian
89 South Academy Avenue
Sanger, California 93657

Re: SITE PLAN REVIEW No. 1507

Dear Mr. Soojian:

It has come to the attention of this office that your project for the development of a mobilehome park on the southwest corner of East Central and South Reed Avenues in Reedley has not progressed materially since the above site plan was approved in 1971. The site was recently inspected by the Building and Safety Division of the Public Works Department. Pursuant to such inspection, it was determined that approximately 15% of the site preparation work had been completed as of February 17, 1977.

It is the opinion of the Department of Public Works, the Planning Department and the undersigned that substantial development has not taken place on such site so as to create a vested right to complete the project. Site Plan Review No. 1507, therefore, is deemed void. Fresno County Zoning Ordinance, Section 874 A (4). And since the General Plan and the Zoning Ordinance no longer permit the establishment of mobilehome trailer parks on your

site, building permits will not be issued for that proposed use on that site.

You may appeal this decision to the Board of Review of Fresno County by submitting a letter in writing, within 15 days of the mailing date of this letter, to the Director of Public Works of the County of Fresno.

Very truly yours,
Robert M. Wash, County Counsel
By J. Steven Lempel
Deputy

JSL:djr
cc:
Walter Clark, Assistant Director, Department of Public Works
John Weaver, Chief Building Inspector, Building and Safety Division
William Carmichael, Land Development Division/ Public Works
Tom Harper, Principal Staff Analyst, Planning Department

Appendix M

Planning Department [Letterhead]

Mr. Asadoor Soojian
4982 Riverbend Road N.
Sanger, Ca. 93657

Dear Mr. Soojian:

Re: Site Plan Review No. 1507

This approval is issued on information provided and attested to by the owner of the property, or an authorized representative, as indicated by the signature on the application for this permit.

Date of application August 4, 1971. This approval is issued for the following property: Site address West side of Reed Avenue between Central and Goodfellow, Zone A-1. Use approved under this permit 264-space mobilehome park.

Legal description of site: E½ of NW¼ and E 10′ of W½ of NW¼ of Sec. 34-14/23

CONDITIONS OF APPROVAL:

Approval of this application is based upon the property owner and/or developer making improvements as required by Section 874 of the Fresno County Zoning Ordinance, and developed in accordance with the site development plan as stamped "approved" by the Planning Department.

All required on-site and off-site improvements shall be completed prior to the issuance of a Certificate of Occupancy. Required site improvements may be bonded in accordance with the provisions of Section 874-C-2.

1. DEDICATIONS

a. The easterly 20 feet of the property shall be granted as right of way to the County of Fresno for road purposes. In addition, a 15 foot radius at the property line at the intersection of Central and Reed shall be granted as right of way.

b. In accordance with Section 874-C-2 of the Fresno County Zoning Ordinance, the required right of way shall be granted before a building permit can be issued. A "Lot Book Guarantee" or "Preliminary Title Report" is required before the above right of way dedication can be processed. To avoid delay in the issuance of necessary permits, it is suggested that you contact the Land Development Division of the Public Works Department immediately. The developer is advised that where deeds of trust or any other type of monetary liens exist on the property, the cost of obtaining a partial reconveyance or any other document required to clear title to the property shall be borne by the owner or developer.

2. ON AND OFF-SITE IMPROVEMENTS

a. The necessary permits for off-site improvements shall be obtained from the Fresno County Department of Public Works, Division of Highways and Bridges, and shall be installed in accordance with Fresno County Improvement Standards.

b. Asphalt concrete driveway approaches shall be constructed along Reed and Central Avenues.

c. That portion of the road right of way between the existing street paving and the new property line shall be

surfaced in accordance with Public Works Standards. If necessary, portions of the existing roadway shall be graded to provide a satisfactory pavement slope.

d. The parking, access, and circulation areas shall be surfaced, striped and channelized as noted on the approved plan.

e. A minimum of 290 off-street parking spaces shall be provided.

f. In all developments where the development is in an area where there is no Local Drainage Plan the developer will be responsible for the following before the issuance of any permit (building, encroachment or road improvement) can be made:

(1) Preparation of a drainage and grading plan to show how the runoff from his property, generated by a 20%—24 hour storm, will be retained on his property, unless he can present to the department a drainage report indicating the storm water runoff from his property will not create a problem to roadways or other properties.

The preparation of drainage studies and plans is the practice of Civil Engineering as defined by Section 6371 of the California Business and Professions Code and accordingly they must be prepared by a Registered Civil Engineer.

(2) The Civil Engineer shall inspect the construction of the drainage and grading plan to determine conformance

---

Note: Site contains existing swale that accepts natural drainage from County roads and adjacent property. The drainage plan shall include provisions for this drainage.

with his plans and shall certify to the department of such conformance before occupancy can be granted for the development.

g. A landscaped area 15 feet wide shall be provided along the Reed Avenue frontage and shall be maintained.

h. A solid masonry wall 6 feet in height, or a 6 foot chain link fence with solid screen planting shall be constructed along the northerly and westerly property line and along the development line on the south. (see site plan) In addition, a 3'-6' high solid masonry wall or chain link fence with solid screen planting shall be constructed along the setback line a minimum of 15' from the new Reed Avenue property line.

3. MISCELLANEOUS

a. Permits for structural, electrical and plumbing work shall be obtained from the State of California, Division of Building and Housing Standards, prior to any construction.

b. Buildings and structures shall not exceed 35 feet in height, except roof structures approved by the Planning Commission.

c. All outdoor lighting shall be hooded and so arranged and controlled as not to shine toward highway traffic or the surrounding living environment.

d. All sign proposals shall be submitted to the Planning Department for verification of compliance with the Zoning Ordinance.

Notes:

a. This development shall be in accordance with the requirements of the Mid-Valley Fire Protection District (see attached copy of letter from M.V.F.P.D.).

b. This development shall be in accordance with the requirements of the Fresno County Health Department, Division of Environmental Health, and the California Regional Water Quality Control Board.

c. This approval is final unless you wish to appeal the matter to the Fresno County Planning Commission. In this event, you may file a written appeal setting forth your reasons for such appeal to the Commission. Such appeal shall be filed with the Director of Planning within fifteen (15) days after the mailing of this decision.

Please contact us if you have any questions.

Yours very truly,

/S/ ROBERT H. GROVE
Assistant Planner

RHG:ak
1 September 1971

Appendix N

State of California
Department of Housing and Community Development
Division of Codes and Standards

Permit to Construct
(Note: Permit and plans are to be available at job site at all times.)

Date: 12/18/72
Expires: 6/18/73 No. 1627
SHL ☐ EPL ☐ EMP/H ☐
MP ☒ Acc/S ☐ CR 14868

Project Name: Soojian's Park, Co. 60, I.D. No. 164
Location: Reed Avenue between Goodfellow & Central
Owner: Asadoor Soojian
Address: 4982 Riverbend Road, Sanger
Applicant: Owner
Description of Work:
Building: Construct 16 x 30 wash building

FEES:

Permit	54.30
Plan Check	24.65
Earthquake	.50
Total	79.45

Valuation: $6,000.00

All construction, mechanical and electrical work shall be in accordance with applicable provisions of the Health and Safety Code and related rules and regulations of the State of California, and with application on file with this office.
Permittee

Approved: Larry Miller

State of California
Department of Housing and Community Development
Division of Codes and Standards

Permit to Construct
(Note: Permit and plans are to be available at job site at all times.)

Date: 12/18/72
Expires: 6/18/73 **No.** 1628
SHL ☐ **EPL** ☐ **EMP/H** ☐
MP ☒ **Acc/S** ☐ **CR** 14868

Project Name: Soojian's Park, Co. 60, I.D. No. 164
Location: Reed Avenue between Goodfellow & Central
Owner: Asadoor Soojian
Address: 4982 Riverbend Road, Sanger
Applicant: Owner
Description of Work:
Building: Construct 28 space mobilehome park

FEES:

Permit	345.00
Plan Check	170.00
Earthquake	
Total	515.00

All construction, mechanical and electrical work shall be in accordance with applicable provisions of the Health and Safety Code and related rules and regulations of the State of California, and with application on file with this office.
Permittee

Approved: Larry Miller

EXHIBIT XIV

Department of Housing and Community Development
[Letterhead]
November 29, 1973

Mr. Asadoor Soojian
4982 Riverbend Road
Sanger, California

Dear Mr. Soojian: I.D. No. 60-164MP

As recommended by Mr. Fred Norton of this office, we are extending your construction permits No. 1627 (construct wash building) and No. 1628 (construct 28 lot mobilehome park) for an additional six months.

The new expiration date of your Permit to Construct is June 18, 1974.

Sincerely,

/s/ BOB F. CONLEY
Codes & Standards Inspector II

Appendix O

Section 18500(a) of the California Health and Safety Code provides in relevant part:

It is unlawful for any person to do any of the following unless he has a valid permit issued by the enforcement agency:

(a) Construct a mobile home park. . . .

Section 18501 of the California Health and Safety Code provides:

> Applications for a permit to construct or reconstruct shall be accompanied by:
>
> (a) A description of the grounds.
>
> (b) Plans and specifications of the proposed construction.
>
> (c) A description of the water supply, ground drainage and method of sewage disposal.
>
> (d) Appropriate fees.
>
> (e) Evidence of the compliance with all valid local planning, health, utility and fire requirements.

Section 18509 of the California Health and Safety Code provides as follows:

> All permits as required in this chapter for construction or reconstruction shall automatically expire within six months from the date of issuance thereof in those cases where the construction or reconstruction has not been completed within said period; provided, however, that the enforcement agency may extend expiration date of said permit for a reasonable time.

Section 21065(c) of the California Public Resources Code provides in relevant part:

> "Project" means the following:
>
> . . . (c) Activities involving the issuance to a person of a . . . permit . . . or other entitlement for use by one or more public agencies. (Effective December 5, 1972)

Section 21167(a) of the California Public Resources Code provides:

> Any action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:
>
> (a) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project. (Effective December 5, 1972)

Section 21169 of the California Public Resources Code provides in relevant part:

> Any project defined in subdivision (c) of Section 21065 undertaken, carried out or approved on or before the effective date of this section and the issuance by any public agency of any . . . permit . . . or other entitlement for use executed or issued on or before the effective date of this section notwithstanding a failure to comply with this division, if otherwise legal and valid, is hereby confirmed, validated and declared legally effective. (Effective December 5, 1972)

Office - Supreme Court, U.S.
FILED
SEP 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-126

In the Supreme Court
OF THE
United States

October Term, 1982

ASADOOR SOOJIAN, et al.,
Petitioners,

vs.

JOHN R. DONALDSON, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FLOYD R. B. VIAU
County Counsel
JAMES B. WATERMAN
Assistant County Counsel
MICHAEL D. OTT
Deputy County Counsel
Del Webb Building, Suite 121P
2220 Tulare Street
Fresno, California 93721
(209) 488-3479
Counsel for Respondents

QUESTIONS PRESENTED

Respondents assert that there is only one possible legitimate question presented by this matter, to wit:

Do the true facts in this matter—and not the facts as seen through the Petitioners' rose-colored glasses—indicate that Petitioners have acquired a vested right to complete development of a mobilehome park?

Further, as argued *infra*, Respondents assert that this question is neither a "federal question" nor "an important question of federal law" within the meaning of Rule 17.1 of the Rules of this Court.

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STATEMENT OF THE CASE

Respondents respectfully urge this Court to ignore the highly argumentative presentation of facts by the Petitioners in their Statement of the Case. Through the various administrative and judicial levels at which this matter has been litigated, the result has been uniformly contrary to the Peititioners' desires. Accordingly, even though the true facts in this matter are well-established, the Petitioners never tire of presenting their version of the facts as gospel.

Respondents urge this Court to consider the within Petition against the background of the true facts, as found by the Superior Court of the State of California. Rather than repeating this information here, however, Respondents respectfully request the Court to consider the Superior Court's Findings of Fact which appear in the Appendix to the Petition at pages A-70 through A-78. These Findings were adopted by the Superior Court, an independent, disinterested third party which, after having reviewed the voluminous record in this matter, arrived at the conclusion that the facts set forth therein constitute the true facts with respect to this matter, untainted by the argumentative rhetoric of either party. And, as the record indicates, the Court of Appeal of the State of California for the Fifth Appellate District has held that these Findings are supported by substantial evidence. (See Petition Appendix at page A-50)

As to the procedural history of this matter in the District Court below, the Respondents assert that the Magistrate did not deny the Petitioners the right to conduct discovery. The record will reflect that the Magistrate made no order whatsoever concerning the outstanding interrogatories. The record will further reflect that the Petitioners voluntarily agreed to postpone the scheduled depositions pending a ruling on the Respondents' motion for summary judgment.

SUMMARY OF ARGUMENT

A. Petitioners failed to raise any question of a "taking" of their property in the Court of Appeals below. Hence, this Court should refuse to entertain any such question.

B. The doctrine of vested rights is a matter of common law and does not present any federal questions for resolution by this Court.

C. The Opinion of the Court of Appeal below is not in conflict with this Court's decision in *Dobbins v. City of Los Angeles*, 195 U.S. 23 (1904), for the following reasons:

1. *Dobbins* dealt with the law of "taking" and is therefore inapposite to this matter as argued above in A.

2. In the *Dobbins* matter, the City of Los Angeles did not urge the Plaintiff's lack of vested rights upon this Court.

3. *Dobbins* is distinguishable from the instant matter upon its facts, being a case which turned upon the fact that an innocent plaintiff had been victimized by certain evil deeds perpetrated by the City of Los Angeles.

D. Because Petitioners have failed to allege the violation of any rights secured to them by any federal statute other than 42 U.S.C. Section 1983, this Court's decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980), is not pertinent to this matter.

E. Petitioners failed to raise any question in the Court of Appeals below concerning the propriety of the District Court's conduct with respect to discovery. Hence, this Court should refuse to entertain any such question.

F. Even though Respondents had previously asserted that there were certain disputed factual issues in this matter, the District Court properly could grant Respondents' motion for summary judgment if it found that there were in reality no genuine isssues as to any material facts.

G. The Court of Appeals below disposed of this matter without passing upon any question of the alleged immunity of certain of the Respondents. Hence, this Court should decline to entertain such questions.

ARGUMENT

Respondents respectfully assert that the requested Writ should be denied for the following reasons:

A. QUESTIONS PERTAINING TO THE LAW OF "TAKING" ARE NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE ENTERTAINED.

A very large portion of the Petition raises questions related to the law of "taking" of property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Respondents assert that questions concerning whether Petitioners' property was "taken" within the meaning of the United States Constitution are not properly before this Court because of the Petitioners' failure to raise or brief such questions below. Neither the Appellants' Opening Brief nor the Appellants' Reply Brief filed by the Petitioners with the Court of Appeals raised any question of a "taking." This is confirmed by the opinion of that Court. (*See* Petition Appendix at page A-3) Thus, this Court should refuse to entertain questions pertaining to any alleged "taking." *See, e.g., N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Adickes v. S. H. KRESS and Co.*, 398 U.S. 144, 147 n.2 (1970); *Tyrrell v. District of Columbia*, 243 U.S. 1, 4-6 (1917).

B. THE QUESTION OF WHETHER THE PETITIONERS HAVE ACQUIRED A VESTED RIGHT TO COMPLETE DEVELOPMENT OF A MOBILEHOME PARK IS NOT A "FEDERAL QUESTION."

The law of vested rights involves no federal questions. In *Avco Community Developers, Inc. v. Southcoast Regional Commission*, 17 Cal. 3d 785, 791 (1976), *cert. den.*, 430 U.S. 952 (1977), the California Supreme Court stated the rule of vested rights:

> "[I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit."

As noted by that Court, the doctrine of vested rights is essentially a matter of common law, and, as the exhaustive analysis of that subject therein indicates, the law of vested rights does not involve any federal questions. *See id.* at 791-98. In fact, as noted by the Court of Appeal of the State of California, the basis upon which the vested rights doctrine rests is the common law concept of estoppel. (*See* Petition Appendix at page A-51) The Court of Appeals below concurred that the question of vested rights was to be determined under California law rather than federal law. (*See* Petition Appendix at page A-2)

The Petitioners' only discussion of the law of vested rights appears in the paragraph commencing at the bottom of page 13 of the Petition and refers only to *Avco Community Developers*. They make no attempt to demonstrate how

the doctrine of vested rights raises any federal question for resolution by this Court.

Indeed, that they could not sustain such a claim is apparent from the past decisions of this Court. It has long been settled law that even an act which dispossesses vested rights does not contravene the Constitution of the United States, provided, of course, that it does not impair the obligation of a contract. This proposition was first enunciated over 150 years ago in the case of *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413 (1829):

> "The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this Act was to devest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United states which applies to a State law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract...."

Accord, The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420, 539-40 (1837); *Randall v. Krieger*, 90 U.S. (23 Wall.) 137, 147 (1874). *Satterlee* involved an act of the Pennsylvania Legislature which allegedly deprived the Defendent of certain vested real property rights. As this Court noted, such allegations do not present questions of constitutional magnitude.

In sum, the alleged deprivations asserted by the Petitioners do not present questions of federal law which require resolution by this Court.

C. THE OPINION OF THE COURT OF APPEAL BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *DOBBINS V. CITY OF LOS ANGELES.*

It appears from the sixth "question presented" by the Petitioners, as well as from their discussion of *Dobbins v. City of Los Angeles*, 195 U.S. 23 (1904), at page 21 of the Petition, that they are relying upon that case in connection with their newly-asserted "taking" claim. Thus, insofar as *Dobbins* pertains to that subject, as argued above, it is inapposite to the within matter.

It is also apparent from the Points and Authorities urged upon this Court by counsel for the City of Los Angeles in *Dobbins*, reprinted at 49 L.Ed. 173-74, that the City did not raise a question of vested rights for this Court's consideration. Those Points and Authorities do not even argue the issue of whether the work which had been completed by the plaintiff at the time of the City's action was sufficiently substantial to warrant a finding that the plaintiff had acquired a vested right to complete her project. Thus, in view of the fact that the City of Los Angeles did not even litigate this particular point, this Court's opinion in *Dobbins* should not be utilized as the standard by which to measure future cases which do in fact turn upon this issue.

Dobbins is also distinguishable from the instant matter upon its facts. Because *Dobbins* was decided in the lower court upon a demurrer, all allegations of the complaint were taken to be true for purposes of the appeal. *See* 195 U.S. at 234. While a review of those allegations led it to conclude that the plaintiff therein had "acquired property rights" by virtue of having purchased certain property and partially erected the proposed gasworks thereon, this

Court was obviously more concerned with the blatant wrong which had been done to the plaintiff by the City of Los Angeles. In fact, it appeared from the allegations of the complaint that the City had conspired with a private party to drive the plaintiff out of business in order to protect that private party's monopoly in the manufacture and supply of gas. *See id.* at 239. Clearly, such conduct could not be, and was not, condoned by this Court.

In the instant matter, there was no innocent petitioner nor any evil governmental entity. Rather, the true facts in this matter reveal the opposite:

Petitioner Asadoor Soojian was a licensed general contractor who, along with other Petitioners, performed work on the site in question without the necessary building or construction permits (*See* Petition Appendix at page A-77). The Petitioners continued this course of conduct even after the Board of Supervisors had tentatively denied their appeal (*See* Petition Appendix at page A-74), in a transparent attempt to bolster their argument that their rights to continue the development had vested.

Thus, it can be seen that *Dobbins* provides no basis upon which the Petitioners herein may rely and cannot be said to be in conflict with the opinion of the Court of Appeals below. Of course, this is particularly true in view of the fact that the decision of the Court of Appeals below turned upon the California law of vested rights, which, as argued above, presents no federal question for resolution by this Court.

D. THIS COURT'S DECISION IN *MAINE V. THIBOUTOT* IS NOT PERTINENT TO THIS MATTER.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court made explicit what should have been apparent from the language of 42 U.S.C. Section 1983 and this Court's prior opinions: Section 1983 encompasses not only the violation of rights secured by federal constitutional law but also reaches the transgression of rights established by federal statutory law. *See id.* at 4-7. Thus, *Thiboutot* offers no assistance to the Petitioners here, for they have alleged no violation of any federal statute other than Section 1983 itself.

Respondents believe that the opinion of the Court of Appeals below (*See* Petition Appendix at pages A-1 to A-5) accurately, and with exquisite simplicity, analyzes the law pertinent to this matter. *Thiboutot* is of no assistance to the Petitioners and is not pertinent to this matter.

E. QUESTIONS PERTAINING TO THE ALLEGED REFUSAL OF THE DISTRICT COURT TO PERMIT DISCOVERY ARE NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE ENTERTAINED.

Respondents assert that the record in this matter will reflect that the District Court did not refuse to permit the Petitioners to conduct discovery. More importantly, however, for purposes of the pending Petition, this question is not properly before this Court because of the failure of the Petitioners to raise or brief such questions below. Neither the Appellants' Opening Brief nor the Appellants' Reply Brief filed by the Petitioners with the Court of Appeals raised any question concerning the propriety of the conduct of the District Court with respect to the Petitioners' discovery requests. Indeed, as can be seen from the opinion of the Court of Appeals (*See* Petition Apendix at pages A-1 to A-5), there is no mention of such issues anywhere therein. Thus, this Court should refuse to entertain questions pertaining to thes. alleged refusals to permit discovery. *See, e.g., N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970); *Tyrrell v. District of Columbia*, 243 U.S. 1, 4-6 (1917).

F. RESPONDENTS' POSITION AT THE PRETRIAL CONFERENCE CONCERNING ISSUES OF FACT IS OF NO CONSEQUENCE IN THIS MATTER.

The Petitioners' outrage at the filing of a motion for summary judgment after the Respondents had asserted in their Pretrial Statement that there were disputed factual issues is of no consequence. The law is well-settled that even when Pretrial Conference Orders specify certain issues to be in dispute, a District Judge may subsequently grant a motion for summary judgment upon the grounds that such issues are not really in dispute and that there are no genuine issues as to any material facts. *See, e.g., S.E.C. v. Murphy*, 626 F.2d 633, 639 n.5. (9th Cir. 1980); *Irving Trust Co. v. United States*, 221 F.2d 303, 305 (2nd Cir.), *cert. den.*, 350 U.S. 828 (1955).

G. THE QUESTION OF THE IMMUNITY OF CERTAIN OF THE RESPONDENTS WAS NOT PASSED UPON BY THE COURT OF APPEALS BELOW AND SHOULD NOT BE ENTERTAINED BY THIS COURT.

Review of the opinion of the Court of Appeals below (Petition Appendix at pages A-1 to A-5) reveals that that Court did not pass upon any question of immunity raised by any of the parties in this matter. Thus, this Court should decline to entertain any such questions. *See, e.g., N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312 (1971).

CONCLUSION

Based upon the foregoing, the Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

DATED: August 30, 1982.

Respectfully submitted,

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